Public Utilities

FORTNIGHTLY

January 24, 1929

PUBLIC UTILITIES REPORTS, INC.
ROCHESTER, NEW YORK

Check up

Try to form a mental picture of the company which is selling you lubricants. Check items on blank below.

Yes	No		
☐	☐	1.	Is it entirely dependable?
☐	☐	2.	Has it a wide choice of crude?
☐	☐	3.	Does it control every process of refining, handling and manufacture?
☐	☐	4.	Has it adequate and efficient shipping facilities?
☐	☐	5.	Does it handle products from well to purchaser?
☐	☐	6.	Has it thousands of tank cars on all the railroads of the country?
☐	☐	7.	Does it maintain warehouses at all important centres?
☐	☐	8.	Has it a fleet of motor vehicles for local delivery?
☐	☐	9.	Has it huge stocks of lubricants of all kinds on hand at all times all over the country?
☐	☐	10.	Are the oils of high grade, of constant quality, fully able to meet your varying requirements?
☐	☐	11.	Can the seller supply all your lubricating needs, and also your burning oils?
☐	☐	12.	Can the seller supply you with unstinted engineering service through experienced and capable lubricating engineers?

If your checks show all "Yes's" you are buying from a "good" Company.

If there are a number of "No's" it will pay you to investigate what The Texas Company offers—for the above is a skeleton of some of the things which are earning a very high regard for Texaco lubricants in the Electric Street Railway field.

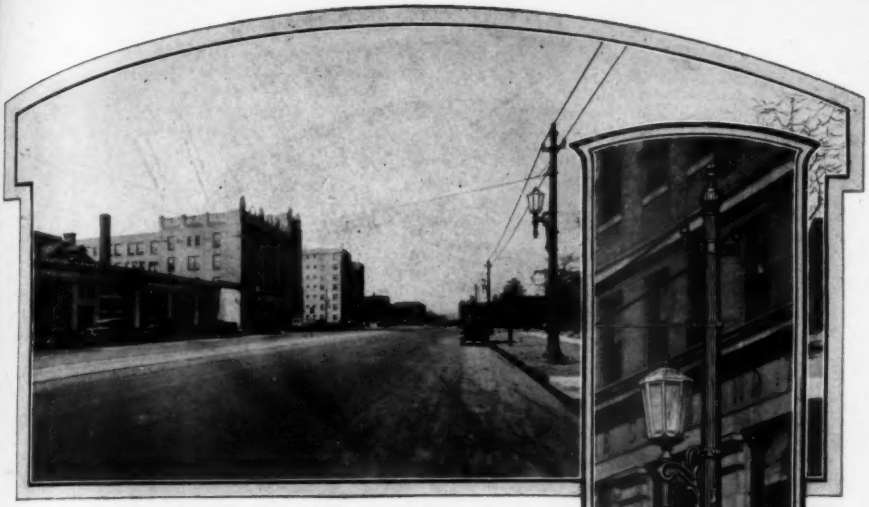
When do you want to take it up with us?

THE TEXAS COMPANY

Texaco Petroleum Products

17 Battery Place, New York City

OFFICES IN PRINCIPAL CITIES



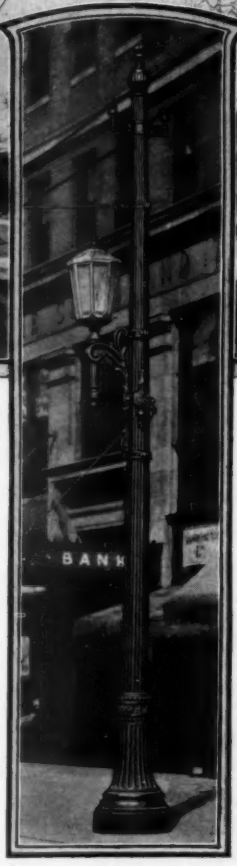
Euclid Avenue, Cleveland, showing Union Metal Heavy Duty Poles supporting the lighting units, the trolley span wires, and the trolley feeder lines.

"*Selling* Better Transportation *Better*"

PERHAPS the most important step in 'selling better transportation better' is the developing and maintaining of a friendly public," says the editor of the Electric Railway Journal in a recent issue.

Many factors enter into the development of friendly public relations, and not the least of these is the problem of poles. In Cleveland, the Cleveland Railway Company is building good will through the installation of attractive Union Metal Fluted Steel Poles as well as by more obvious means. These poles, used jointly by the railway company and the city, have reduced the number of poles along the curbline and have substituted an ornamental pole for the old ungainly type.

The result here, as everywhere, has been that good will has accrued to the railway company—and to the city itself. Not only the adjoining property owners but also the general public has been pleased. In addition, over a period of years, this investment will more than pay for itself due to the durability and negligible upkeep expense of Union Metal poles.



Union Metal Design No. 4271 with General Electric Form 23-B lantern as used in Cleveland, Ohio. Over-all height, 24 feet.

THE UNION METAL MANUFACTURING CO.
General Offices and Factory, Canton, Ohio
Branches—New York, Chicago, Philadelphia, Cleveland, Pittsburgh, St. Louis, San Francisco, Los Angeles, Jacksonville.

UNION METAL
DISTRIBUTION AND TRANSMISSION POLES

III

Public Utilities Fortnightly

VOLUME III — January 24, 1929 — NUMBE

PUBLIC UTILITIES REPORTS, INC.

PUBLIC UTILITIES FORTNIGHTLY; a magazine dealing with the problems of utility regulation and allied topics, including the official decisions of the State Commissions and courts; endorsed by the National Associations of the Utility Industry and by the National Association of Railroad and Utilities Commissioners, and supported in part by those conducting public utility service, manufacturers, bankers, accountants and other users of the publication. Published every other Thursday; $1.00 a copy; $15.00 a year; with bound volumes and Annual Digest, $32.50 a year. Editorial and advertising office, Munsey Building, Washington, D. C., circulation office, Duffy-Powers Building, Rochester, N. Y. Entered as second-class matter April 29, 1915, at the Post Office at Rochester, N. Y., under the Act of March 3, 1879.

Pages with the Editor

THIS issue of PUBLIC UTILITIES FORTNIGHTLY appears in its new, enlarged and (the Editor trusts) improved form.

* *

IN its purpose to be of the greatest possible interest and helpfulness to the executives of public utility corporations, several new editorial features have been added, and others are to be added in the succeeding numbers.

* *

DURING the past few weeks substantial gains have been made in the circulation of the magazine — so substantial, indeed, that the Editor must conclude that the important utility heads in this country believe that the publication meets a real and a growing demand.

* *

IN its new typographical dress, PUBLIC UTILITIES FORTNIGHTLY conforms to the standard magazine size—which is the most convenient size to hold in the hand and the most convenient for reference purposes in bound form.

* *

AND as a reference work, in bound form, the magazine is of special and unique value—as the bound volume in the offices of many of the most prominent utility executives in the country attest.

* *

To get evidence that his magazine is not only of interest, but also of practical value to his readers, is one of the inspiring compensations of an editor. In this particular form of compensation this particular Editor is becoming increasingly well-rewarded.

* *

THE latest tribute of this kind comes from the southeastern division of the National Electric Light Association, which asks permission to reprint in pamphlet form an article by our own Mr. Francis X. Welch, entitled "Merchandising by Public Utilities," which appeared in our December 13th issue. Of course, our reply was, in effect: "Yes."

* *

THIS is still another form of service which this magazine is rendering—and expects to continue to render—to the public utility organizations of the country.

* *

HERE is the kind of letter that starts the Editor's day off with a smile; it comes from Mr. R. W. Perkins, President of the Eastern Connecticut Power Company. He says, in part:

* *

"PUBLIC UTILITIES FORTNIGHTLY has always carried information of great value and interest, especially to our attorneys. It seems to me that the new form in which they are now presented will cause them to make an appeal to the company executives as well. I find this quite true in my own case."

* *

THE above commentary brings special gratification to the Editor, as it comes from just the type of utility executive for whom this magazine is designed.

* *

THE decisions of the courts and of the State Commissions, as officially recorded in this issue of the magazine, are of unusual interest and significance; they treat of several important phases of public utility regulation, including the powers of states as affected by Federal powers or restrictions, bus operation by a subsidiary of a railway, restrictions on telephone use, diversion of gas, and rates for artificial and natural gas.

* *

FOR instance, in the Lehigh Valley Railway Case (on page 209), the Supreme Court of the United States has announced principles governing Commissions in ordering the elimination of dangerous grade crossings by railroads when the questions of impending bankruptcy and interference with interstate commerce are raised. Procedure on

appeal in such cases is also given attention.

* *

THE much discussed question of disregarding a corporate entity and dealing with the forces back of the corporate organization is considered by the California Commission (see page 193) as an incident to the granting of authority for motor carrier operation by a company subsidiary to the Southern Pacific Company and the discontinuance of trains in territory to be served by the motor transportation company.

* *

TELEPHONE company officials will be interested in the ruling by the Pennsylvania Commission (on page 221) on the right of a storekeeper to permit unlimited use of his phone by customers, instead of installing a coin box. Another decision of interest to telephone men is that of the New York Commission (page 224) on the question of directory listing for tenants of a subscriber who operates a private branch exchange in his office building.

* *

GAS utilities frequently face the problem of dealing with consumers who apparently have diverted gas through by-passes. This situation is met by the Pennsylvania Commission in disposing of a complaint against discontinuance of service for theft of gas (page 228). Two other opinions affecting gas companies are those of the Springfield Gas Light Co. (page 229), and the Logan Gas Co. (page 232), in both of which rate-making problems are passed upon. Heating quality of artificial gas is also considered in the former case.

* *

ALL of these opinions, of course, together with other cases involving Commission regulation, will be reprinted in permanent form in the bound volumes of Public Utilities Reports.

* *

To serve as a medium of information between the State Commissions, widely scattered as they are; to disseminate knowledge concerning their problems, not only among the Commissioners themselves, but also among the executives of the utility corporations and others, and to carry the official decisions, orders and recommendations of the Commissions, is one of the most important objectives of this magazine. And a definite objective it is.

* *

THAT this objective is being attained is evidenced more and more as the magazine grows and acquires reputation and authority.

* *

HENCE it is with pride that the Editor finds in his morning mail a letter like this—from Mr. C. V. Wood, President of the Springfield (Mass.) Street Railway Company. He writes, in part:

* *

"THE vastness of the public utilities field of today, covering as it does the distribution of electricity, water, gas, transportation by water, rail, and even through the air, necessitates regulation wisely directed. It seems to me that the knowledge disseminated by PUBLIC UTILITIES FORTNIGHTLY has done a great deal towards bringing about more intelligent regulation. This convenient manner of obtaining decisions rendered in all parts of the country must be of great value, not only to the members of Commissions whose duty it is to protect the interests of the people who are so vitally affected, but also to executives, engineers, accountants, attorneys, and others. I find that the intricate problems of operation, valuation, taxation and depreciation are well covered and I can heartily recommend the magazine to anyone who is connected with the public utilities field."

* *

IT seems probable that by the time the next issue of PUBLIC UTILITIES FORTNIGHTLY goes to press—exactly two weeks hence—some important matters that are now under consideration will have come to a head and will become available for publication.

* *

THE next issue will be published on February 7th.

—THE EDITOR.

JANUARY

24	T^h	A dramatic impetus was given to the demand for trans-continental transportation facilities by the first discovery of gold in California, 1848.
25	F	The New York Stock Exchange made its first move to become a world market by inaugurating plans for handling foreign stocks, 1927.
26	S^a	The Interstate Commerce Commission proposed to Congress that the railroads be forbidden to own coal properties beyond those necessary for their fuel; 1907.
27	S	The corner-stone of the electric light industry was laid when EDISON took out his first incandescent light patent, 1880.
28	M	The first commercial telephone exchange in the world was opened at New Haven, Conn., with a switchboard of eight connecting lines, 1878.
29	T^u	The House Committee on Rivers and Harbors listened to the plan of the Secretary of Commerce for 10,000 miles of waterway for the middle west, 1926.
30	W	The Lackawanna Railroad conducted its first tests of radio communication on moving trains, 1914.
31	T^h	The first paid press dispatches were sent across the Atlantic by radio, thus marking a new era in utility service, 1907.

FEBRUARY

1	F	The first telephone exchange in Nevada was opened at Virginia City, 1882. First screw steamship propeller patented, 1838.
2	S^a	The water supply of Rome was increased by a 38 mile aqueduct, built at a cost of $8,000,000 and the labor of innumerable slaves; 144 B. C.
3	S	Trans-Atlantic radio stations were opened to the public for the transmission of messages between the United Kingdom and the principal towns in Canada; 1908.
4	M	The Interstate Commerce Commission was created, 1887. *Plan now for the Middle-west Geographic Division Convention, April 24, 1929.*
5	T^u	Shippers of Greece first sought protection by following celestial and geographical charts devised by ANAXIMANDER of Miletus, 570 B. C.
6	W	Money, as a medium of commerce, is first mentioned in Genesis XXIII, when ABRAHAM purchased a field, 1860 B. C.
7	T^h	The first patent for an electric telegraph was taken out by COOKE and WHEATSTONE, of London, and by SAMUEL F. B. MORSE, of the U. S., 1837.

Drawing by Abell Sturges

LEON O. WHITSELL

Chairman of the California State Commission

—See Page 100

Public Utilities

FORTNIGHTLY

VOL. III; NO. 2 JANUARY 24, 1929

The PUBLIC UTILITIES AND THE PUBLIC

EVER since Colonel Lindbergh set the *Spirit of Saint Louis* safely down in the field of La Bourget, after his history-making flight over the Atlantic, there has been a marked and universal increase in the interest in aviation. We are becoming "air-minded."

Unquestionably this is a progressive and laudable attainment, but it must be tempered by common sense, particularly in the field of utility air service. The fact that aviation is the vogue, is not an excuse for permitting pell-mell competition of air carriers under the impression that we are encouraging the science of flying. That is the surest way, indeed, to hamper its development. Cut-throat competition is just as suicidal to air carriers as it is to busses, trains, and other unfortunate examples we have witnessed.

Commercial air service to develop soundly and successfully must be regulated scientifically just as every other type of utility is regulated, and now is the time to do it before the air is cluttered up with a legion of adventures flying junk and death-traps and claiming priority rights that will take the courts years to untangle.

The Pennsylvania Commission has pointed the way. Some months ago the Gettysburg Flying Service, Inc., convinced that body that it could serve the public in the vicinity of the historic battlegrounds by furnishing a taxi service. Authority was given and the plan has apparently succeeded because now others want to enter the field. But there is not enough business for two companies in Gettysburg and the Commission refused to authorize a competitive service, saying:

> "The Commission recognizes that the policy of the nation and state is to foster and encourage aviation. The facts in this case, however, are in the opinion of the Commission convincing that in a community such as Gettysburg the creation of unnecessary and destructive competition could not and would not be a contributing factor in the development

of commercial flying in Pennsylvania, but would be a decided hindrance to its development. Common carrier transportation by air craft must be developed for some time at least by and through private enterprises which should not be required to struggle for an existence in the commercial field under conditions as existing in this case."

Re Battlefield Airways, Inc., App. No. 19269.

The Resale of Electric Current by Landlords

THE right of a landlord to buy electricity at power rates for resale or redistribution to his tenants is a matter that has been causing considerable recent agitation.

The owner of Sixty-Seven South Munn, an apartment house in the city of East Orange, New Jersey, applied to the Public Service Company for the installation of a master meter. It was the plan of the landlord to install meters for resale of current to the tenants. The New Jersey Board pointed out that the tenants would get little if any benefits from this arrangement, whereas the utility would be deprived of the profits from retail business which it could otherwise have. This loss would possibly be reflected in an increase in the unit cost per customer in supplying service to remaining patrons, thereby adversely affecting the general public.

The Board refused to order the utility to install the meter, stating that any plan or method which would take from the state the power to control the rates and service between the public and the utilities is opposed to the policy of regulation adopted by the state and would not be permitted. The Board made a distinction in its ruling favoring the owners of hotels and office buildings furnishing current as part of the rent charge. Redistribution by the landlord under such circumstances was said to be permissible.

Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co.

Scenic Beauty as Well as Water Power Is a State Asset

"IT goes without saying that Colorado's climate and scenery are and doubtless will continue to be in the future its greatest and most invaluable assets," said the Commission of that state in denying an application for a preliminary certificate to consider the hydroelectric development of the famous Royal Gorge. "It is impossible to place a money value on them. All reasonable care and caution should be exercised to avoid the impairment of the scenic beauty of this state, particularly such an outstanding feature as the famous Royal Gorge. Therefore, we doubt whether the public convenience and necessity requires the contemplated project so constructed and operated as to divert all of the water but 50 cubic feet per second or any comparable amount from the gorge, even though the people of the state of Colorado might conceivably buy their electrical energy from the applicant at a trifle less than it would otherwise cost. We doubt seriously whether the public convenience and necessity would require any

project if the greater part of the water is to be taken from the gorge in low water stages or if all of it is to be diverted during the night, even though none is taken out during the day."

Re Public Service Co. Application No. 1005, Decision No. 1961.

The Depreciation of Natural Gas Plants

NATURAL gas wells only have so long to live. A calculation of this lifetime makes the problem of computing depreciation somewhat difficult for a natural gas company. In a recent rate dispute between the city of Pittsburgh and a natural gas company there was some difference of opinion as to whether the so-called straight-line or sinking-fund method should be used to calculate the depreciation reserve. The Pennsylvania Commission said:

"The above is only of academic importance as any computation of annual depreciation on a life basis either on 'straight-line' or 'sinking-fund' formula, leads to either a constant or increasing annual payment during the remaining life of the property. With a natural gas property, however, facing a declining production and revenue, an annual depreciation and amortization allowance that is related to the annual production and sale of gas, appears to best satisfy the requirements of the business."

Pittsburgh *v.* Equitable Gas Co., Complaint Docket Nos. 4538 *et al.*

A Standard Rate for a Standard Utility Product

LAST spring the Springfield Gas Light Company orally applied to the Massachusetts Department for exemption from the calorific standard of 528 B.T.U. established by that body, and requested that the Department determine that 500 units be sufficient. At that time, on the advice of the director of the gas and electric division, the Department was inclined to the opinion that, if the company could make a corresponding reduction of rates, it would be wise to permit the reduction of B.T.U. contents. It was pointed out that there were many gas engineers convinced that, in the making of certain types of gas, advantages are derived by the public in a lower B.T.U. standard with a reduced price, it being contended that the lower standard gas is a firmer gas and results in a more uniform quality at the burner. The company, however, was disinclined at the time to make a reduction. The Department accordingly decided that unless the company was willing to make a proportionate rate reduction, the B.T.U. standard should not be decreased in the absence of a public hearing giving an opportunity to customers affected to be heard.

Re Springfield Gas Light Co. D. P. U. 3223, 3280.

When Power Contracts Are Assignable

AN electrical distributing company in California had a supply contract with a power company which the latter assigned on authority of the Commission to another supply company. Previous to this assignment,

however, there had been some difference between the original parties to the contract about reduced rates, and the distributing company had not paid all of the amount due. Upon suit by the new supply company the distributing company interposed as a defense that such a contract was not assignable. The district court of appeals of California held that the contract, so far as shown, contained no stipulation against assignment, nor any provision which expressly or impliedly forbade performance by another company.

"Furthermore," said Judge Cashin, "there was nothing to show that the skill or other quality peculiar to the power company, or the nature of the service, was a material inducement to the contract—and it appears that the appellant, with knowledge of the facts and without objection, except as to the rate charged, accepted deliveries from the plaintiff and made monthly payments on account. Such circumstances sufficiently indicate a waiver of objections to the assignment."

Pacific Gas & E. Co. *v.* Universal Electric & Gas Co. Civ. 6251, 271 Pac. 377.

The Authority of Commissions over Municipal Plants

OUT in Murray City, Utah, J. C. Davis, who had opened an automobile service station recently complained to the Utah Commission that the city refused to furnish him with electricity for his business upon the same terms and conditions as energy was furnished to every other citizen of the city. The Commission was compelled to dismiss the complaint for lack of jurisdiction in view of a decision by the supreme court in which it was held that municipal plants were not within the jurisdiction of the Commission.

Davis *v.* Murray City, Case No. 923.

When Bus Service May Be Substituted for Train Service

THE local passenger trains of the Southern Pacific Motor Transport Company operating around the Santa Cruz district have been unprofitable for some time. Recently the company asked the California Commission for authority to abandon these trains and for a certificate of convenience and necessity to substitute bus service through the operation of a subsidiary company. Competing bus companies already in the field objected strenuously to the granting of the new certificate, but the Commission finally awarded it on the following basis:

"Where it appears in an application seeking substitution by a railroad company of branch line passenger service with auto transportation on practically paralleling highways that there is no carrier operating in the territory performing the identical service applied for; that the proposed service will be adequate, satisfactory, and at reasonable rates; that residents are desirous of and will patronize the proposed service; that the rates proposed will make the operation a self-sustaining one; that the proposed service will not increase the competitive situation theretofore existing be-

tween railroad companies and auto carriers then operating in the territory; and that the result of such proposed service will be merely to permit the railroad, either by itself or through its subsidiary, to continue to perform a necessary service without financial loss to any carrier operating in the territory, a sufficient showing has been made to justify the issuance of a certificate of convenience and necessity."

Commissioner Carr, in a vigorous dissenting opinion, said that the Commission should apply to a subsidiary bus company seeking to substitute abandoned rail service, precisely the same rules as when an independent company was asking authority and the rail carriers were protesting thereby giving a preference to any existing bus carrier able to handle the new traffic.

Re Southern Pacific Motor Transport Co., Decision No. 20361, Application No. 13775.

When Hydrants May Be Used for Fire Drills

THE fire department in the borough of Magnolia, New Jersey, has desired to use fire hydrants of the Laurel Springs Water Company for fire drills. In a complaint by the borough, it was pointed out that the utility had refused to permit use of the hyrants for that purpose. On a hearing before the Board of Public Utility Commissioners, however, the company denied that it had refused to permit the fire drills, and made it clear that it had no intention to challenge the right of the members of the fire company to use the fire hydrants for drills. The Board, after bringing out these facts, said that in all such cases, however, the water company should be advised of the time when the drills were to take place in order that it might be informed at all times of any unusual draft of water on its system.

Commission Orders May Not Be Served on Attorneys

MR. REAUGH was the attorney for the city of Flora, Illinois, in a recent crossing proceeding. Evidence on a subsequent hearing disclosed that while a certain order of the Illinois Commission had been served on Mr. Reaugh that no order had been served on the city of Flora, but that the attorney had withheld any knowledge of it from the city and lulled it into security by informing the officials that the crossing in question would not be disturbed. The Illinois Commission commented on this situation as follows: "The final order of this Commission cannot be served regularly upon an attorney of record and the parties affected are not estopped from availing themselves of the provisions of the statute and may at any time come in and resist the enforcement of the order and upon a proper showing vacate the order.

Department of Public Works & Buildings *v.* Baltimore & O. R. Co., No. 13867.

No Speculating with Utility Customer's Money

THE Logan Gas Company, following out a progressive and constructive policy to assure a future supply of natural gas, leased nearly a hundred thousand acres of untested field, by the terms of which lease the company is given the exclusive right to enter upon the premises and test for gas and oil and to remove them if discovered. In a recent rate proceeding, the Ohio Commission was asked to value these leases as useful property for rate making. The Commission in denying this request said: "In all fairness to both the company and the affected public this is a proposition which demands close scrutiny on the part of the regulatory body. Granting that a forward looking policy is commendable and that a future supply of gas should be assured, if possible, common sense alone would seemingly deny any public service company the right to pyramid its reserve holdings at will and compel current users of a commodity to assume the financial burden entailed when it is certain that little, if any, of the additional acreage will ever benefit them."

Re Logan Gas Co. Advanced Utility Rate Proceeding Nos. 189–192.

A Quick Way to Stop Unlawful Motor Service

THERE was considerable evidence that Ralph Wright and Walter Tucker, a copartnership, doing business as Wright & Tucker, were operating a motor freight business for hire without any authority between Georgetown and Danville, Illinois, and intermediate points. The Illinois Commission dismissed the complaint, however, stating: "As the Commission construes the evidence in this case, there is not sufficient evidence upon which to base a recommendation by the Commission to the Attorney General, inasmuch as the complainant has a complete remedy in the premises in the circuit court by injunction or prosecution for penalty for violating law in operating without a certificate, a proceeding that would be necessary in any event if the Commission recommended it.

Georgetown Transp. Co. *v.* Wright, No. 18477.

Stop-Over Privileges on Interstate Busses

WHENEVER anyone in Pennsylvania buys a ticket to some point outside of the state from the Purple Stages, Incorporated, a bus company engaged in interstate commerce, he must sign an agreement that he will continue his journey within forty-eight hours should he elect to exercise a stop-over privilege within the state. The Reading Company thought that this was a subterfuge to invade the field of intrastate transportation. Accordingly, for the purposes of a test case it had one of its employees buy a ticket at Reading, Pennsylvania, for New York city. The passenger left the bus at Allentown, Pennsylvania, and did not continue his journey.

Upon complaint, the Pennsylvania

Commission conceded that the mere fact that the business of the bus company purported to be entirely interstate commerce and that passengers were required to pay a fare to a point outside of the state did not determine the character of the business. It was said that passengers should be permitted to leave the vehicles only under such reasonable limitations as would probably not result in the conduct of an intrastate business. However, in view of the comparative distance from Reading to Allentown and from Allentown to New York city it was felt that the action of the bus company in permitting the stopover was not unreasonable.

Reading Co. *v.* Purple Stages, Complaint Docket No. 7779.

The Special Status of Telegraph Companies

THE Florida Commission has no authority to tell a telegraph company where it should locate its stations, according to the recent pronouncement of the supreme court of Florida. The Commission attempted to require the Western Union Company to install a station in or near the business center of Apopka, Florida. The court conceded that the statute gave the Commission authority to tell other common carriers where to locate terminals, but distinguished such carriers from telegraph companies as follows: "By the very nature of the subject-matter of regulation, telegraph companies cannot be regulated by the same rule, mode, or prescription that railroads and other common carriers are regulated. The nature and character of the service performed is different; the manner in which it is performed is different in many respects."

State ex rel. Wells *v.* Western U. Teleg. Co., 118 So. 478.

Proper and Improper Applications of "Reproduction Costs"

IN a recent rate dispute between the city of Pittsburgh and the Peoples Natural Gas Company there was considerable difference of opinion as to the proper application of reproduction cost. Although no final decision was made on the question, the Pennsylvania Commission discussed this difference as follows: "Engineers for the complainant proceed on the theory that the property is to be reproduced at current prices under present conditions and on the basis of wholesale construction. They exclude from their estimate the cost of dry holes. They include certain previously used gas well equipment at prices of second-hand material rather than at cost new, substitute the cost of less costly steel for cast iron piping actually in use and exclude as nonused or useful certain dwellings built in remote sections and occupied chiefly by employees of the respondent company. Engineers for the respondent proceed on the theory that the property should be reproduced at current prices under original rather than present conditions and by the method of piece-meal construction, and include the estimated cost of dry holes."

Pittsburgh *v.* Peoples Nat. Gas Co., Complaint Docket Nos. 4542, et al.

Higher Courts Cannot Review Fact Findings of Lower Courts

THE city of Wichita contested a proposed advance of bus rates before the Kansas Commission. That body ordered an increase over a previous 5-cent fare with the understanding that a new motor bus company would be organized consolidating all existing lines making necessary investments on expenditures to give the Wichita public an efficient motor transportation system. The district county court examined the evidence and found that the rates ordered by the Commission were excessive and unreasonable. Whereupon the matter was appealed to the supreme court of Kansas, and the appellants asked that the whole matter be examined by the highest court. Judge Dawson, speaking for that court, said that the highest court had no authority to go behind the conclusions of facts reached by the lower court based upon competent evidence.

Wichita *v.* Hussey, No. 27970, 271 Pac. 403.

A Common Fallacy about the Taxation of Utilities

"A great many city managers," says a gentleman from Indiana, "operate their own public utilities, with the results that the profits go back to the city and help lighten the tax burden." If he is correctly reported he added to that: "One city, by the operation of its utilities, is entirely tax free."

To be free from taxation seems to be a life-long desire; but attempts to escape taxation are as futile as was Ponce de Leon's search for the fountain of perpetual youth. As long as it is necessary for the city or state or nation to expend money for governmental purposes, there is no possibility of the elimination of taxation. All the politicians can hope to do is to shift the burden from one class of citizen to another, or to camouflage the process of collecting the money by raising it indirectly instead of by direct levy.

If it costs a city $1,000,000 to run its government, and that city makes $1,000,000 a year profit out of one or more public utilities which it owns, and applies that profit to the payment of its expenses, its citizens do not escape taxation. Their tax bill amounts to $1,000,000 no matter how it is collected. If this amount of money is raised by direct levy in a tax roll, the bills of those who take the utility service could be $1,000,000 less.

The only way taxation can be reduced is by reducing the expenses of government. The only way citizens can be tax free is by having a government that costs nothing.

Why Utility Companies Cannot Contribute to Charity

A politician upon retiring from the office of sheriff, recently took the public into his confidence by issuing a statement that showed the total amount of money he had received on account of salary and fees

and the amount which he, as a politician, had deemed it advisable to pay out for various purposes. Among his expenditures were certain amounts contributed to very worthy organizations and commendable enterprises. A politician, it seems, to be successful, must be freehanded.

That is one important difference between a politician and a public utility company.

Utility companies are not required or permitted to charge to operating expenses contributions to enterprises not connected with the business, no matter how praiseworthy those enterprises may be. Utility companies are not even allowed to subscribe money for the support of the most worthy charitable organization, as an expense of the business. Stockholders may subscribe as individuals but the companies themselves cannot do so, if they expect to pass the expense along to the rate payers.

Rate payers may support any charity they please, but they cannot be forced to contribute indirectly by company subscriptions.

When a Utility Is Not a Utility

THE moment a company ceases to be a public utility, at that moment the State Commission's control over its activity ceases.

A California water utility recently got the consent of the California Commission to sell the company's properties to a municipal district. There was some question as to how the proceeds of the sale should be distributed. The Commission said that after the authority for the transfer had been granted the Commission had no power over the disbursement of monies received from the sale to the company's creditors or stockholders.

Who the "Lobbyists" Really Are

READERS of the *Congressional Record* often come across remarks on lobbying. The dictionary defines a lobbyist as "a person who solicits members of a legislature for the purpose of influencing legislation."

There does not seem to be anything out of the way in this; but when the term is used by a United States Senator, it seems to have a somewhat specialized meaning. When a Senator for example, twits a colleague of voting for a measure favored by a lobby, he is not seeking to sprinkle his brother with attar of roses. If one follows the debates in the Senate closely, he finds that bills are favored or opposed mainly by two classes of persons—by "lobbyists," in the Senatorial sense, on the one hand, and by "public spirited citizens of high character," also in the Senatorial sense, on the other. Both seek to influence legislation by conversation with the members of the legislative body.

How are we to tell which is which?

The answer seems to be that a "lobbyist" is one who is for legislation we are against and against legislation we are for. A "public spirited citizen of high character" is the citizen who is on our side.

Public Vs. Private Welfare

An important part of this country's policy of utility regulation is the protection from unwarranted competition. But this policy is not permitted to stand in the way of progress. When far-sighted individuals discover a new way of doing an old service, the existing utility must keep pace with the times or lose the protection of its monopoly.

Mr. J. C. Allison, for example, was a large cotton producer in Southern California, well acquainted with the agricultural resources of territory tributary to San Diego both in the United States and Mexico. Mr. Allison considered the expense of hauling merchandise from the warehouses back in the city out to the ships in the harbor. He conceived the idea of eliminating this expense by leasing the strips of tideland along the bay shore from the city and erecting warehouses that would permit the loading of ships moored along their sides. The project had the unqualified endorsement of the Chamber of Commerce, the city council, and the Board of Harbor Commissioners. But the operators of existing warehouses objected.

There was evidence moreover that the new warehouses would be well patronized and the volume of outbound traffic from the port would be greatly increased. The California Commission wisely granted the authority sought—with the observation that its duty was to determine what would be for the public welfare only.

Reserve Funds for Meeting Unforeseen Contingencies

Gas utilities, particularly those that deal with natural gas or mixed gas, are frequently confronted with the problem of meeting expenses connected with adverse weather conditions. In a recent rate case before the California Commission the following remedy was suggested: "It is apparent from the discussion above that gross revenues will fluctuate considerably from year to year, depending upon weather conditions, with a resulting marked effect upon yearly net revenue available for return. It would seem that the most effective method of stabilizing net revenues so that a fairly uniform return might be earned through a period of years of varying weather conditions, would be by means of a reserve set up for this purpose, similar to the contingency reserve made effective some years ago on the Southern California Edison electric system for the purpose of minimizing the yearly variations in water conditions and hence in steam generation fuel cost. Such a step cannot be taken without co-operation from the utility involved, and we, therefore, suggest that these utilities give serious thought to the establishment of reserves impounding excessive yearly revenues in years of low temperature conditions, and from which withdrawals could be made in years of high temperature conditions with consequent lower revenue." *

* *Re* Southern California Gas Co. Decision No. 20448, Case Nos. 2463-2465, 2453, Application Nos. 13477, 12965.

"The State Commissions Are Corrupting Utility Officials"

A Challenge and a Reply

By HENRY C. SPURR

ALTHOUGH the regulation of public utilities by State Commissioners has been going on for more than twenty years, it is still a comparatively new movement.

Any innovation of this nature, whether good or bad, is destined to arouse opposition. Franklin's experiment with his kite, drawing lightning from the clouds, was sneered at. Fulton's steamboat was laughed at and Fulton himself was called a fool. Alexander Graham Bell's telephone was regarded as a plaything and the inventor was termed a "ventriloquist and imposter." Similar illustrations may be cited indefinitely. On the other hand the critics of perpetual motion seem to have the better of the argument; so, although there is plenty of evidence to show that the critic may be wrong, there is always the chance that he may be right. It is well, therefore, to give respectful consideration to what the critic has to say—especially if the criticism comes from an authoritative source.

MUCH of the talk against Public Service Commissions has been carried on by those who are unfamiliar with what the Commissions have done and are doing; much of it, too, by disappointed litigants whose interests have been adversely affected by Commission decisions. A good part of it has originated with persons who are hostile to private ownership and operation of public utilities, and who would, therefore, like to see Commission regulation fail.

Recently, however, criticism of these regulatory bodies has been made by an economist of high standing, Professor Philip Cabot of the School of Business Administration of Harvard University. In an article in the *Atlantic Monthly*,* he expresses an opinion of Commission regulation far from flattering. In fact, as Chairman Prendergast of the New York State Public Service Commission said in an address at the New Orleans Convention of the National Association of Railroad and Utilities Commissioners, Professor Cabot does not merely find fault with Public Service Commissions; he indicts them.

Professor Cabot attempts to palliate whatever may be found out of

* "Ethics and Politics, The Public and their Utilities," in the September 1928 issue.

order with the utilities as the result of the Federal Trade Commission investigation—even stealing—on the ground that the Commissions have led utility men into temptation. Referring to the managers of the holding companies whose methods are under investigation, he says:

> "It is quite generally believed, and often said, that their standards of business ethics are low. But let us call a spade a spade. What the promoters of the investigation really believe is that these men are guilty of thef and they expect to prove it. Perh ps they may; but if by theft we mean taking property which belongs to someone else, I make bold to assert that the Government has forced them into it by the methods of profit regulation now in use. If stealing is going on, the government began it."

By "the government began it" Professor Cabot evidently means the State Commissions, for he says:

> "Practically all the states have statutes establishing Commissions for the purpose of regulating rates and the quality of the service of all public utilities doing business within their jurisdiction. Their most important task is to determine whether the rates charged are just and reasonable. So far as rates are concerned, this is their whole duty. No Commission in the land is directed to regulate profit; rates and rates alone are to be regulated. The statutes creating the Commissions did not aim to declare any new principle of law, but merely to set up new machinery for administering principles which are older than the common law. The principle that prices shall be just and reasonable is very ancient, and it was for the purpose of establishing such rates that the price-fixing powers of the State Commissions were given them. But the Commissions have gradually slipped away from this position, and instead of regulating prices so that they shall be just and reasonable they now more commonly regulate profits."

Thus the basis of the indictment against the Commissions is that they have, without authority, laid their hands on utility profits, thus inflicting a grievous wrong on the owners, taking away something that belongs to them, confiscating their profits—or stealing them—if one wishes to tell the story in strong language.

It would only confuse the issue to discuss the academic question whether Professor Cabot's theory of price regulation or the one of which he complains, as applied to public utilities, is supported by the better reason. It may be that the reasonableness of rates should be measured by the value of the service, or what the traffic will bear, chastened by such competition as utilities are undoubtedly subject to, rather than be determined with reference to the cost of producing the service, including a reasonable return to investors. Whether Professor Cabot is right or wrong about that is, however, beside the point.

When one aims the shaft of criticism at the State Commissions for applying what has come to be known as the American theory of regulation, he must consider the laws under which the Commissions act, as those laws are written. The Commissions cannot be blamed for what the laws ought to be. Professor Cabot would not dispute that. His bill of particulars against the Commissions is that they have adopted the reasonable re-

turn or profit basis of rate making on their own hook. He says no Commission in the land is directed to regulate profits. The reasons by which his view is sustained, he declares, are somewhat technical. They are not set forth in his article but he offers to break a lance with any man in their defense. It is to be hoped that some one will be found to enter the lists, for it may be that the laws governing Commission action have been misunderstood.

In the meantime, let us see if we cannot ourselves discover whether there is any basis, technical or otherwise, for Profesor Cabot's position that the Commissions were not directed to regulate profits and thus upset principles which are older than the common law.

IN Massachusetts, Professor Cabot's own state, the Railroad Commission in 1911 in fixing or changing rates of carriers was required to "give due regard among other things to a reasonable return upon the value of the carrier's property."

How is a Commission to apply principles of rate making older than the common law in the face of such a statute?

In New York state the statutes require that the Commission, in fixing rates, "shall give due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies in determining the just and reasonable rates."

Is that a principle of rate making older than the common law? If not, how can the New York Commission disregard it in favor of Professor Cabot's theory?

In West Virginia the Commission is forbidden to reduce rates below a point which would prevent any public service corporation from making a net return "of 8 per centum per annum." Where will one find any principle of rate making like that older than the common law? This at least forces the Commission to take profits into consideration in order that the companies shall receive the protection of the statute.

By constitutional provision the New Mexico Commission in fixing rates for telephone and telegraph companies is required to give due consideration "to the earnings, investments, and expenditures as a whole within the state."

Is this not the principle of rate making of which Professor Cabot complains? And is it not ample authority for Commission action to which he objects?

In many of our states the requirement that the value of utility property and the earnings of the companies is to be taken into consideration in rate making is mandatory. In others provision is made for valuation, without specifying the purpose, leaving the question of rate making to the discretion of the Commission. Perhaps in such states the use of property value is not made compulsory, in order to allow the Commission to give more weight to other factors.

In no state is the Commission required to adhere to the economic standard of determining the reasonableness of rates and forbidden to

take earnings into consideration, and in no state could it fail to take notice of profits in reducing rates. On the question of confiscation of earnings, it is necessary to consider earnings.

To say, as Professor Cabot does, that regulation of profits by the Commissions amounts to confiscation of profits is begging a question which has long since been settled otherwise by the supreme court. But assuming that regulation of profits is the confiscation of profits, responsibility for it does not rest on the Commissions.

THE statutory law of the various states would seem to furnish a complete answer to Professor Cabot's statement that no Commission in the land is directed to regulate profits. The statutes are not and were not intended to be a re-enactment of economic law. They recognize an artificial standard set up by the courts for determining the reasonableness of rates, and that standard is that the rates as a whole shall be deemed reasonable when they produce a fair return on the fair value of the property used or useful for the service. Whether that standard is wise or foolish, is not for the Commission to say. Since they must obey state law, they cannot be blamed for doing so. Even if the common law did not regard cost as an element to be considered in determining the reasonableness of charges for service—an assumption not admitted—the common law could not be invoked as the guide for Commission action in the face of statutes of the nature cited.

If one examines the decisions of the courts he will indeed have to be technical in their interpretation if he finds any support for the view advanced by Professor Cabot that no Commission in the land is directed to regulate profits, notwithstanding the fact that the courts in appeals from Commission decisions are dealing with the question of confiscation of income rather than reasonableness of rates. Speaking to this point, Commissioner Prendergast, in his New Orleans address, said:

> "It cannot be maintained that valuation of the properties of public utilities has been brought to that exact state of method which is satisfactory either to the Commissions or to the utilities. But it is a fact that the rule for finding valuation laid down in Smyth v. Ames was not a rule simply for the occasion of that litigation, but a rule which has been constantly reaffirmed by the Supreme Court of the United States down to the present time. If the Court did not intend it to be a rule, why has it not criticized the constant recourse to that rule which has been made by courts and Commissions? The history of valuation for the past ten years shows that this rule has been wrought into a formula and that this formula has been recognized by Federal and state courts although they have frequently rejected the use made of that formula. It may be that there is some better formula; but no one has so far suggested it, and the difference of opinion concerning valuation has principally hinged upon the point 'what is the fair value of the property?' The utilities have not objected to the formula. They have insisted that fair value meant reproduction cost, as opposed to so-called book value. This formula or dogma has had general acceptance as a basis for determining valuation and was used in the New York courts in determining the application of the rent laws enacted as part of our housing relief scheme some eight years ago."

BUT, disregarding both statutes and court decisions on the subject of rate making, can it be said that there is any sound basis for Professor Cabot's defense of possible utility wrong doing on the ground that state legislatures and not the Commissions have adopted the theory of regulation to which he objects?

Some edge is taken off of his argument by the fact that the utilities themselves have not opposed the formula. They have gone to the courts many times to complain that their profits have been confiscated, but not on the ground advanced by Professor Cabot.

To quote Commissioner Prendergast again:

> "Have profits been confiscated? If rates have been found to be too low, the electric utilities have not been afflicted with any shrinking modesty in asking that a fair profit or return be allowed to them, and in most cases they have had substantial justice. Utility managers have time and again asserted that all they required was a fair valuation and a fair return. Given a fair return they could pay their fixed charges and dividends, and also provide for special contingencies and an allowance for surplus. It is a novel idea that the oppressive policy of the Commissions has forced these holding companies to resort to devious ways in order to secure extra profits from the operating companies, but that is exactly what Professor Cabot alleges. It is asserted that the Public Service Commissions have been the seducers of the virgin-minded managers of the holding companies. We are told that they have been made desperate, and forced to find new fields and pastures green from which to pluck the ripened fruit of managerial charges. No, this is not the difficulty with the holding companies. The sole difficulty, and the public has taken cognizance of it, is that there has not as yet been impartial inquiry to determine whether the evils charged against the industry have any basis in fact."

If the states have adopted an unsound policy of regulation because of a misconception of the monopolistic character of the utility service—an asserted fact which may be here conceded for the purpose of the argument only—should the managers of the holding companies be blamed if they have adopted alleged unethical methods for the protection of profits?

This is the interesting question, stripped for examination, which Professor Cabot asks.

THAT there may be no misrepresentation of Prof. Cabot's position, let him speak for himself. He says:

> "When profits are regulated instead of prices, the temptation to carelessness, or even crookedness, in the handling of operating expenses and capital charges is very great. A man who has worked hard to earn a profit in a competitive field like the electric power business may be pardoned if he uses every weapon within his reach when he sees that profit threatened. This is the position into which the regulating Commissions have driven the public utility managers by applying old economic theories to new conditions." . . .
>
> Here, for example, is a situation which often occurs. After years of work and anxiety the managers of a holding company may have worked out for one of their operating units a schedule of prices which suit the customers so well that they will buy the service in such quantity as to show a handsome profit, and to this schedule of prices the managers have

obtained the approval of the regulating Commission. But, as things are now, their profit may be taken away from them if it happens to exceed what the Commission regards as fair. Confronted with this dilemma, can you blame a manager if he seeks some way to camouflage the position by introducing some intercompany profit into the operating expenses which, while increasing them and reducing the apparent profit, will in fact keep the profit of this holding company intact? No one can justify such a proceeding by any ethical standard, but before we condemn those who resort to it we should consider who led them into temptation."

This is damning the holding company managers with faint praise.

THE utility business is today conducted on a high ethical plane and with a real regard to responsibility of the managers and their obligation to stockholders and the public. If the record of the past is any criterion, the leaders of the great public utility industry will be the first to clean house if it is found that anywhere in the organization ethical standards have been or are being violated; and they would probably be the last to interpose the alibi, if found guilty, that they are not to be blamed because they were led into temptation. Professor Cabot, himself, says such action would not conform to any ethical standard.

Well, if an action does not conform to ethical standards, by what other standards are we to judge whether it is right or wrong, commendable or blameworthy.

Ethical standards are standards set up as a result of long experience, and with such human wisdom as we possess, for the purpose of securing the greatest liberty of action and happiness of society as a whole. There is a pretty well established ethical code which society expects and in many instances insists shall be followed. If a man enters another's house and steals, can it be said he is not to be blamed if both men are law-breakers? The thief may appease his own conscience and probably does—by the excuse that he has himself been wronged; but society will not accept that excuse. It would be too unsafe. So, if it should turn out that unethical practices have developed in holding company operations, the defense that the managers were led into temptation by the Government will not be likely to be listened to. The plea that one who has sinned was tempted of the devil, has been overworked. It is no longer looked upon as a valid excuse for unethical practices.

If, however, one may regard this reasoning as a little too refined for every day use by the average man there is at least one ethical standard which the average man will stand for day in and day out, and that is that a game must be played according to the rules. What would one think of a foot ball team which tried to excuse off-side play on the ground that the rule against it did not meet with the approval of the team? Even among gamblers, cheating is not encouraged.

THE policy of regulation to which Professor Cabot objects, whether wise or unwise, right or wrong, and whether framed by the states or by the Commissions has been in opera-

tion for a quarter of a century. The utility companies have not objected to it, but merely to its application or construction in individual cases. There has been ample time for those who did not like, and do not like, the modern theory of regulation to have withdrawn their capital for use in other industries where the old rule of regulation by competition is still in force. Most of the money in the present utility business has been invested with a full knowledge of the rule or test of reasonableness of utility charges definitely established by the states and their Commissions and interpreted by the courts. Investors have been free to come in or stay out. They have chosen to enter the game under rules established by the Government. What Professor Cabot really asks is whether they should be blamed for off-side play. The answer is: Yes.

And that reply would probably be the answer of the utility men themselves.

But Professor Cabot's introductory statement to the effect that holding company operation is beneficial to rate payers and that "unless the State Commissions fail in their duty, it is utterly impossible for these operating units to demand or receive an excessive price or to earn a monopoly profit," will be readily agreed to by those familiar with state regulation of utility companies. There has been no satisfactory evidence as yet in cases in which the question has arisen of any attempt to conceal operating profits by extortionate charges by holding companies to their operating companies. On the contrary, operating companies as the record of many cases shows, generally receive service from holding companies cheaper than they could furnish it themselves, or get it elsewhere.

Promissory Notes of Utilities Limited to 12 Months

In states in which utility securities are regulated, the companies are allowed to issue short term promissory notes for periods of twelve months or less without securing Commission approval. Those notes, however, cannot be renewed without the consent of the Commission, if the combined terms of the original note and the renewal note exceed a 12-month period. Twelve months is the standard limit of time for the issue of utility company notes without Commission approval.

Remarkable Remarks

MRS. GIFFORD PINCHOT
Wife of the former Governor of Pennsylvania.

"The O'Fallon case is important to you and to me because if the railroad wins, the high cost of living automatically will be driven higher and higher."

WILLIS K. WING
Editor of "Radio Broadcast."

"Congressmen, apparently, will not keep their hands off radio, although they simply do not know what it is all about. This proposal (the Dill Bill, to limit broadcasting stations to 10,000 watts), is as silly as one to limit the number of seats in a theater."

DR. JOHN A. RYAN
Professor at Catholic University, Washington, D. C.

"If the rule of the Indianapolis case (of utility valuations) receives general application to the public utilities, the people will be compelled to recognize definitely that the policy of regulation has failed."

HON. WILLIAM A. PRENDERGAST
Chairman, Public Service Commission of New York.

"The first ten years of state regulation were its least eventful."

GEORGE B. CORTELYOU
Chairman, Joint Committee of National Utility Associations.

"There is neither a power trust nor a power lobby. There has not been, nor is there today, any effort, concerted or otherwise, upon the part of the utilities to distort or misrepresent their policies or their accomplishments. Their critics have been unable to disprove either the statements or the statistical data embodied in their publications."

GEORGE O. SQUIER
Major-General, U. S. Army, retired.

"The American Telephone and Telegraph Company . . . spends $15,000,000 a year on research and employs 4,000 specialists."

MATTHEW S. SLOAN
President, New York Edison Co.

"For every form of utility service there exists one or more substitutes, though seldom can any substitute show by test the desirability, the value or even the actual low money cost of utility service."

EDWIN C. BROOME
Chairman of the Committee recently appointed by the National Education Association to investigate propaganda in the schools.

"When the Commission on the curriculum first commenced its work, I was besieged with letters from various parts of the country wanting to know if we were going to take a crack at the temperance advocates in the schools, or whether we were going to introduce the program of peace education, or whether we were going to introduce into the course of study propaganda to help for greater military preparedness, etc."

A CORRESPONDENT
from Budapest.

"More than 500 of the conductors on the Budapest street car lines are lawyers and physicians who lost their practice through the fortunes of war."

GEORGE O. SQUIER
Major-General, U. S. Army, retired.

"If we were all using this old style carbon lamp instead of this gas-filled tungsten bulb, our light would cost us a billion dollars a year more than we now pay."

CHARLES E. GURNEY
Former Public Service Commissioner of Maine.

"In my seven years upon the Commission, I never heard a suggestion of the expediency of any decision or finding, relative to matters before the Commission. We tried to decide matters according to the law and the evidence, regardless whether our decisions were pleasing or otherwise."

HON. WILLIAM A. PRENDERGAST
Chairman, Public Service Commission of New York.

"The conflict over rates has degenerated into a factious proceeding in which municipal officers endeavor to use this occasion as a means of enhancing their political control over the unthinking element of the community."

MATTHEW S. SLOAN
President of the New York Edison and allied companies.

"Because electrical energy is affected with a public interest, the utility company has no right to supply electrical energy under any circumstances where it will be resold by nonutility corporations at an advance in price and at a profit, at rates unregulated and arbitrarily discriminatory."

EDWARD M. BECK
Managing Editor of the "Chicago Tribune."

"It seems to me that an intelligently conducted system open and above board—of combating the public ownership propaganda spread by groups of theorists among college professors is, or would be, perfectly legitimate and beyond criticism. The theorists have been preaching their gospel to the students for nearly a generation and I cannot see why the presentation of the other side of the picture, honestly done, should be deemed unfair in any respect. It certainly is no more than reasonable that the school and college pupils should have the private ownership view as well as the government ownership arguments."

PAUL BELLAMY
Editor of the Cleveland "Plain Dealer."

"It is perfectly apparent that any individual corporation or group of persons has a right to use all legitimate methods to get its side of any debatable matter before the public. Many a time I have intentionally used statements from utility officers because these statements were part of a news story running at the time, and I did not consider that propaganda any more than the President's messages in propaganda."

MARVIN CREAGER
Managing Editor of the "Milwaukee Journal;" (in referring to the public relations activities of utility corporations).

"As to speakers before women's clubs and similar organizations; make sure that organization members are informed of where the speaker comes from and whom he or she represents."

KENT COOPER
General Manager of the Associated Press.

"The best advice I could give the public utility people would be that since it seems necessary that public utility corporations have press agents, they should be honest press agents who come in the front door and deal over the counter, presenting for publication nothing but the truth."

JOHN SPARGO
Writer, lecturer and former Socialist

"I have never received pay, directly or indirectly from any utility company or its agents for speaking against public ownership. But for many years I did receive pay for speaking in favor of public ownership from organizations maintained for that purpose."

MATTHEW S. SLOAN
President of the New York Edison and allied companies.

"If and when the sub-metering concerns are eliminated from the electric business in New York city, we promise the users of our service the largest rate reduction ever made by a public utility."

WALTER M. HARRISON
Managing Editor, "Daily Oklahoman and the Oklahoma City Times."

"The public utilities of the nation spent $25,000,000 in advertising in 1927. I hope every dollar of it was purchased on a business basis. If you spent a dollar for advertising copy to sweeten a local editor in the hope of getting him to help your local franchise on his editorial page you were a sap."

SAM A. BAKER
Governor of Missouri, (as reported in a newspaper dispatch).

"I believe the public school's curriculum should be so modified as to provide for the instruction of the pupils in regard to the activities and the problems of the public utilities. The children should be taught to have a knowledge of these utilities, and to respect them."

EDWARD W. BEATTY
President and Chairman of the Board, Candian Pacific Railroad.

"In Canada are two major railroad systems—a privately-owned one, competing with a government-owned one. The latter has heavy deficits which can be made good only by taxation, while the former (the Canadian Pacific), is the largest taxpayer in the country. It is, therefore, the largest contributor to the coffers of its principal competitor."

How Shall We Regulate the Bus?

By JOHN BAUER

Director of the American Public Utilities Bureau, New York City

Does the public interest require a readjustment of regulatory standards for bus transportation?

The Public Service Commission Law of the state of New York provides that a street railway, gas, electric, or other public service corporation, may occupy the streets, highways, or other public places for the purposes of construction or operation of its properties, only after it has obtained from the Public Service Commission (or the Transit Commission) a certificate of convenience and necessity. This is an official statement that the contemplated improvement is really needed by the public. It is required even where the corporation concerned must obtain separate approval from the municipality and where a franchise has been granted after public inquiry as to local needs and policy.

Similar statutory provisions appear in most of the states. Although the reasons for them are not directly expressed in the statutes, they were clear in the minds of the legislators at the time they were enacted into law. Prior thereto there had been vast confusion in the issue of franchises by municipalities. There were wide differences in practice, not only in different sections of the country, but in individual states. There was useless duplication of facilities, wasteful competition, unnecessary invasion of streets and public property, and interference with the real convenience and efficient service.

The characteristic of the pre-regulation era was the belief in the economic doctrine of competition applied to utilities as well as to other business. Municipal authorities, like most political leaders of the time, looked askance at monopoly over a service vitally needed by the people. In dealing with public service corporations, they sought to preserve for the public the benefits assumed to flow from competitive operation.

It took considerable time for responsible representatives of the public to learn that the nature of public utilities is different from ordinary business, to which the time-honored principle of competition applies. Eventually, however, they came to realize that street railways, gas, and electric properties—all the then recognized utilities—constituted natural monopolies, which cannot be forced into the competitive mold. The chief economic characteristic is the large plant investment required, and the heavy fixed charges imposed upon the property. When a plant has once been constructed, it is capable of supplying service on a large scale at

decreasing costs as the volume of business increases. If a second plant is produced, there will be no more traffic in the aggregate, and the total costs to be borne by the public are greatly increased.

This economic fact was learned through experience—after competition had been introduced, and after the public had been burdened with high costs and poor service. That monopoly is necessary in the public interest became gradually recognized, and was the controlling reason for including in the regulatory statutes the requirement of a certificate of convenience and necessity before any utility can proceed with construction and operation under a new franchise. It was the recognition of the monopolistic character of utilities that led to active regulation after 1900. In most of our larger cities the era of competitive activity had passed and monopoly had become a reality, notwithstanding the efforts to enforce competition. This was brought about through successive consolidations, which far too often resulted from receiverships, due to inadequate business to maintain the fixed charges of competitive systems.

BESIDES the investment factor which inevitably led to monopoly in local utilities, there was also the factor of limited street capacity available for construction and operation. Two or more street railways manifestly could not place their tracks upon the same street. A different company might operate on a nearby street, which would affect the results of operation; but, in any one street, monopoly had to be recognized. The same state of facts prevailed in other utilities, which for construction and operation required the use of streets and public places. The multiplication of gas mains, water mains, and telephone lines in a street could not be permitted. There had to be limitation, and the rational limit was a single property.

Regulation was introduced when competition no longer existed. It recognized the fact that utilities are natural monopolies. Its object henceforth was not only to protect the public against arbitrary monopoly power, but also to protect the monopoly itself and to prevent the introduction of undesirable competition, which might bring injury instead of benefit to the public.

UNDER the new system of regulation thus adopted, the power of giving final authorization of construction and operation under a particular grant was placed in the same Commission which had control in other respects. It was given control over service, rates, financial practices, and other public relations. It assumed responsibility to protect the public against monopoly power. It was thus properly clothed also with the responsibility of giving or withholding final approval for the extension or the construction and operation under a franchise. The object was to conserve and promote the public interest, coupled with the duty of dealing fairly with the companies. As a long-run policy, the standards which would work to public advantage would also safeguard the companies and assure fair dealing for the investors.

When an application for a certificate has been made, the usual course is to hold public hearings before the

Commission. The pertinent facts are placed in evidence as to the importance of the service, why it is needed, as well as to any objections made by individuals or groups. The decision must rest upon the facts, not upon mere caprice—but no fixed standards have been or could be set up, by which a decision is to be made in every case. The range of facts is wide, and local conditions differ. The Commission cannot limit itself by technical rules. It must have in mind the actuality whether a proposed service will contribute materially to the public convenience, and whether it does represent in any substantial way a necessity from the public standpoint.

THE two terms (convenience and necessity) usually employed in the statutes, have been the subject of a good deal of "learning" in Commission and court opinions. The substance of all the discussion is to establish the common sense of the statutory provision. Convenience must be regarded from the standpoint of the public. It is public convenience, and not a mere casual desire of a few individuals that must be considered. The term "necessity" indicates that "convenience" is to be considered in a broad public sense. Conversely, the term "convenience" shows that "necessity" shall not be viewed so as to exclude all additional services, except upon extreme need of the community. Each term modifies the other; the two are used in a rational way, so as to make available new services and facilities that are reasonably needed. It is the public interest that is to be served, and the public aspect that must have paramount consideration.

AMONG the facts considered as to whether or not a certificate shall be granted, is the choice of the operator, and particularly the effect upon an existing utility.

If the same company which already operates in the territory seeks an extension or additional grant, there is usually no difficulty in obtaining the certificate. If, however, a different company is the petitioner, the Commission will inquire into the proposed operation—whether or not it will compete with the existing facilities, and what the effect will be upon the existing operator. It is not under compulsion to protect the monopoly of an existing company, but it will not allow competitive service which may be against the public interest.

A standard that has been generally accepted is that of financial ability; a certificate will not be issued unless the petitioner proves able to carry out the undertaking. This applies particularly to new companies. The Commission is eager of assurance that the proposal will be successfully carried out. It will not grant a certificate if the company has not available sufficient resources to furnish the facilities, or if there is not in prospect sufficient business to make the enterprise remunerative.

The reason for this financial standard is in part to prevent the waste of capital funds. While the Commission need not be especially concerned whether a particular individual or company wastes capital, it recognizes the fact that there is a public function in preventing the waste of funds in facilities for which there is no demand. It seeks, therefore, to prevent

such waste, if the facts appear plain that the business cannot succeed.

The Commission, however, has also a second feature to consider—the public inconvenience caused by an uncompleted or an abandoned property. If a company does not have capital enough to complete the construction, it will leave the streets or highways partially torn up, cause needless traffic interference, and compel the municipality or state to restore normal conditions. The same consideration applies to properties whose construction has been completed, but abandoned after completion because they fail to become self-sustaining. The facilities are then left in the streets as useless obstructions. The Commissions must, therefore, have regard for the fact whether an applicant will be able to complete construction promptly, and whether the enterprise will be successful from the operating standpoint.

THE foregoing analysis applies generally to conditions as they have existed for the most part since the regulatory statutes were enacted. Most applications have involved new street railways, electric and gas properties—utilities that involve a large plant investment and are natural monopolies. Competition was destructive, and the protection of monopoly was desirable from the public standpoint. Financial ability on the part of the applicant was essential, and the public convenience required that the prospective service should have reasonable prospect of being financially self-sustaining.

There is a question, however, whether these fundamental conditions have not shifted materially, during recent years, in respect to many applications that have come up for consideration, especially those which have to do with operation of busses. We may ask whether the standards developed in dealing with the older and more usual form of utilities, properly apply to the new conditions. This is a pertinent question, because of the many bus applications and because of the rapidly growing importance of bus transportation.

The general objective of the Commissions in dealing with busses is, of course, no different than in passing upon the application of other utilities. The purpose is still to serve public convenience and necessity; a certificate, in any case, is to be granted if actually the public will be served materially,—if there will be substantial advantage to the people of the territory. The economic factors in a bus application, however, are materially different from those of street railways or electric light and gas properties. Bus operation differs, for example, from street railways in the very characteristics which led to the recognition and protection of monopoly in that industry. A comparison of the two forms of transportation is especially significant, because of their competitive aspects. The same basic distinctions, however, exist also between busses and the other older utilities.

IN the case of street railways, the fundamental facts which led to the establishment of monopoly were; (1) the large investment required in road, structures and equipment; (2) an investment when once made was, to a

large extent, fixed and immovable, so that its success depended upon the patronage of the locality; it was wasted capital unless it was financially successful where it was located; (3) only a single operator could occupy a given street or roadway.

Consider the busses in regard to each of the three factors. They do not require any investment in special roadway or structures; they occupy the public streets and highways, and form merely a part of the general vehicular traffic that must be provided for. The amount of necessary investment, therefore, is relatively much smaller than for street railways. There is, also, the second difference, that the bulk of the bus investment is in vehicles, which may be readily shifted from one territory to another, wherever service may be most needed. Failure of successful operation in a particular locality, results in very little loss of capital and causes no public interference. When the busses are taken from the streets, there is no obstruction left.

There is, finally, this third distinction; in the case of busses actual competition is possible, while only one railway can operate physically in a given street. Two or more bus companies may operate without any physical interference with each other, or without shutting off other traffic. The vehicles of each company would merely contribute to the total vehicular traffic on the street, without confusion, except as to the number of vehicles. So far as street congestion is concerned, it is immaterial whether, say, 100 busses are supplied by one operator or by a dozen.

THERE is also a difference in conditions of service regulation. In the case of street railways which occupy special structures, the rational course is to place all phases of service control in the Commission, which is thus able to maintain uniform standards of service independent of the communities in which a company operates. The situation, however, is altogether different with busses. The single control by the Commission becomes impossible because the vehicles occupy the streets, without limitation to particular structures, and stop at the curb. Hence, the stations must be assigned by local authorities, which also must regulate the busses in respect to the general use of the streets. There is an inevitable extension of local control in actual bus operation, and a reduction in Commission control. The question, therefore, arises whether the old standards should not be replaced by policies more in harmony with the inherent character of the new utility.

THE Commissions may feel bound by the standards developed in relation to the older utilities, and may not consider duly the underlying facts of the new utility. Some, indeed, may not realize that they are dealing with a different kind of economic agency which does not correspond in basic characteristics with the older utilities, for which specific existing procedure has been adopted. It is necessary for the Commissions to consider the new utility, which has developed with leaps and bounds, in its relation to the objectives of regulation and to the real convenience and necessity of the public.

In facing squarely this new utility, the Commissions should also have regard for the fact that it furnishes a different kind of service from the street railways. Its relation to street railways is similar to that of electricity to gas in the field of lighting. While both busses and street railways furnish transportation, just as both electric and gas companies provide illumination, the new mode of transportation is different, so that the Commissions must consider the availability of the new service in its relation to the old. If they should just follow the standards that have been set up in dealing with certificates for new street railway service, they might disregard and oppose the basic convenience and necessity of the public. They might shut off or retard the development of bus transportation, although it may be capable of furnishing a more economical, more comfortable, more attractive, more flexible, and more speedy service than can be rendered by the street railways. They would be exactly in the same situation as if the development of electric lighting had been held back to protect gas illumination and if the public had thus been deprived of the advantages in convenience and economy of the superior service.

THESE are fundamental matters pressing upon the Commissions. They may not have received, up-to-date, the direct study and consideration that public convenience and necessity require. One of the standards properly applied when a new street railway line is proposed, is the effect upon the existing line. If the latter can furnish the service, and if the new line would cut materially into the traffic, the certificate is denied. Shall the same policy apply to busses?

Another standard is the selection of the operator. If the new line is deemed to be for the public convenience and necessity, the grant is given to an existing company, in preference to a new company which might compete with the existing properties. Shall the same idea control in dealing with bus applications? If so, there is danger that the bus certificates will be utilized, not for the purpose of advancing the new mode of service to its full economic possibility, but to protect the old street railway investment against possible competition of the new and apparently superior mode of transportation. If this is the consequence of applying the old standards to the new utility, then the certificate of public convenience and necessity would be converted into a source of injury to the public interest.

THESE and similar problems present themselves as Commissions attempt to apply the statutory requirement for a certificate to those who wish to introduce utility service under new economic conditions. But, in the main, the objectives of lodging this power with the Commissions remain the same as when they were first embodied into law—to assure the public the quantity and quality of service that the community demands.

Among the facts, however, they should not fail to consider the inherent economic qualities which may be obscured by the very standards adopted to meet difficult conditions. They should give these facts their proper weight in administering the law.

The Purpose of "Promotional Rates"

THE big problem with most gas and electric companies does not consist so much in getting new customers as having old customers make more use of the service.

Every time a new consumer is signed up, it costs the company something to install the meter and maintain his service, no matter how much or little he uses. Operating expenses climb as the number of patrons increase.

Stimulation of consumption, however, is not all that is needed for a proper expansion of the business. The customer's demand on the plant must also be taken into account. If every one who uses gas service, for example, should turn on the gas at the same time, our streets might have to be ripped up for bigger mains. The old mains might not have the capacity to supply this enormous demand at the time it is made. Therefore, scientific rate making lies in the encouragement of consumption over long-hour periods, thus reducing high peak demands. Schedules drafted with this object in view are called "promotional rates."

Loosely speaking, the term might apply to any rate calculated to stimulate consumption. But it has a special application to rates made to induce the use of household or other heavy duty appliances; or, it might apply to a general class rate such as a rate to small house holders. Behind every real promotional rate, however, is the idea of increasing the net revenue from each customer.

An excellent example of a promotional rate is furnished by a special water-heater rate allowed by the Michigan Commission. There are two main types of hot water heaters. One is known as "the instantaneous." It has a number of burners which flare up at the twist of the faucet and actually heat the water as it runs through the pipe, creating a terrific demand for perhaps a few seconds. The other is a tank built on the principle of a thermos bottle. The water is heated gradually by a small flame and then kept hot until ready for use by the insulation around the tank. The Michigan Commission has permitted a lower rate to encourage the long hour consumption of the thermostatic heater.

The "room count" was originally a plan to measure the demand of the electric consumer. The more rooms he had, the more his demand might become, because of the larger number of lights he could turn on at one time. The room count is now used as a basis for offering a special rate to encourage consumption.

How California Regulates Its Public Utilities

"It has cost approximately one dollar to every thousand dollars of their revenue within the state to regulate the utilities in California. On the other hand for every dollar expended by the Railroad Commission in regulating the utilities, there has been returned to the rate payers $7 in reduced utility charges —irrespective of any savings accruing because of the refusal of the Commission to sanction requested increases in rates, or the part played by the Commission in winning substantial reductions in interstate rates."

BY HENRY A. FRAZIER

RECORDER OF THE CALIFORNIA RAILROAD COMMISSION

CALIFORNIA, with a population of approximately four million, five hundred thousand and an area of 155,652 square miles, comprising an empire virtually 770 miles in length and 230 miles in width, offers an extensive field for public utility regulation. Because of its vast area, and diversity of topographical and climatic conditions, the state presents nearly every possible problem that enters into public utility operation, while its rapid growth renders the handling of these problems a constantly progressive and expanding task.

THERE are 1762 public utilities that come under the control and regulation of the California Railroad Commission.

The Railroad Commission consists of five members appointed by the Governor for 6-year terms. The legislature may remove Commissioners by a two-thirds vote. The members of the Commission are: Leon O. Whitsell, President, Clyde L. Seavey, Ezra W. Decoto, Thomas S. Louttit, and William J. Carr.

The Commission has the control and regulation of public utilities engaged in the transportation or conveyance of passengers or express or freight of any kind, the transmission of telephone or telegraph messages and the production, generation, transmission, and delivery or furnishing of heat, light, water or power or the furnishing of storage or wharfage facilities, either directly or indirectly to or for the public, and it has and may exercise the power and jurisdiction to supervise and regulate these public utilities, and may fix the rates to be charged for the commodities furnished or services rendered to the

public. No railroad or other transportation company may increase the charge for transportation or any charge connected with or incidental thereto without the approval of the Railroad Commission, after a showing that the increase was justified. No discrimination in charges or facilities may be made by any transportation company between persons or places or in the facilities for the transportation of the same classes of freight or passengers, except that after a hearing the Railroad Commission may authorize a lower rate of charge for longer distances and the Commission may authorize the issuance of excursion and commutation tickets. The Railroad Commission also has power to require adequate service to be maintained, to regulate use of equipment and to authorize or require physical connections and joint use of facilities. The Railroad Commission is also authorized to fix the value of property of a public utility taken by eminent domain by the state or a political subdivision or other public agency.

THE importance and extent of the Railroad Commission's responsibilities may be best appreciated when one considers California's enormous resources and wide activities.

The heavy agricultural production of California, and its growing industrial life, ranging from the production of raw timber and mineral products to the manufacture of nearly every conceivable article required in modern life, with certain sharply specialized productions each running into the hundreds of millions of dollars annually, has caused an extraordinary development of public utility service and facilities.

The annual crop survey of California for 1927, made by the State Department of Agriculture, shows a total value of all main field, fruit and vegetable crops of $474,840,000. This compares with a like estimate of the 1926 crops of $464,982,000. Live stock products are estimated at $190,000,000, giving a total of agricultural products of $664,840,000. An estimated valuation of all crops in the various states gives California in 1927 the rank of third place. In 1925, and also in 1926, California ranked second in the estimated valuation of all crops in the various states. Of the main field and fruit crops alone 11,703,700 tons were harvested in 1927 compared to 11,787,000 tons in 1926. An increase in acreage of the main field crops also produced an increase in total tonnage, while an increase in the bearing acreage of fruit crops produced nearly three hundred thousand tons less fruit in 1927 than the previous year. In this connection, however, there was a probable production of over two hundred thousand tons which were not harvested and, therefore, not estimated in the total tonnage produced the past year. The average value per ton in 1927 of the main field crops was 48 cents greater than the average value per ton for the previous year, while the average value per ton of the fruit crops harvested in 1927 was $4.21 greater than in 1926. An increase of about 29,000 acres planted to vegetable crops in 1927 increased the total valuation of such crops $1,276,000 more than the value of such crops the previous year.

California's industrial activity may be gauged from the following figures taken from the United States census report for 1925:

Number of establishments, 9,638; average wage earners 249,552; total wages paid $350,835,411; cost of materials, $1,474,887,292; value of manufactured products, $2,442,952,-104.

Figures from the same source show the value of manufactured products produced by the two principal cities of the state as follows:

Los Angeles, $1,014,230,874; San Francisco, $437,925,582.

As one step in the handling of the problems that confronted it, the Railroad Commission authorized public utilities to issue $218,559,617.57 of stocks, bonds, notes, and other evidences of indebtedness during the fiscal year ending June 30, 1928. Since its reorganization in 1912 the Commission has authorized the issuance of $2,718,609,741.41 of such securities. An approximate idea of the value of the public utility properties devoted to the public service may be gained from the fact that the grand total of installed capital carried on the books of the utilities is $3,279,585,-169.24.

The prices which are being paid for public utility properties or for stock of public utility corporations by representatives of holding companies has been given considerable attention by the Commission. It has uniformly required that such part of the price paid for public utility properties which it regarded excessive, should not be capitalized through security issues or charged to fixed capital accounts. It is firmly convinced that its policy of limiting security issues to the actual cost of the properties, allowing the present land value, due consideration being given to earning rather than the sale price of such properties, is sound and in the interest of both the purchaser of public utility securities and the patron of the utility.

The Commission has not permitted the capitalization of an alleged value of operative rights of stage companies, or the alleged going concern value of public utility properties. In authorizing the issue of securities the Commission has proceeded in accordance with its established policy that bond issues should not exceed sixty per cent of the depreciated historical cost of public utility properties, with land considered at its present value, and that it is not in the public interest to recapitalize public utility properties on a basis so that a new utility will show an earning materially below the average cost of money on its proposed stock issue.

During the calendar year 1927 public utilities operating in California reported gross earnings on their business within the state amounting to $591,988,000, as compared with $543,091,000 for 1926. During 1927 the utilities paid out in dividends $125,614,281.84, as against $109,-312,215.97 in 1926.

Steam railroads during the year 1927 carried 41,821,723 passengers in California as compared with 43,156,-341 in 1926; and 44,199,058 tons of freight as compared with 44,799,393 in 1926.

Electric railways during the year 1927 carried 708,641,500 passengers

as compared with 712,569,466 in 1926, a decrease of 3,927,966.

The 405 water companies report 531,071 consumers in 1927 as compared with 485,572 in 1926, an increase of 45,499. The total investment in their properties was approximately two hundred and five million dollars.

Electric light and power companies report 1,329,050 consumers in 1927 as compared with 1,254,878 in 1926, an increase of 74,172. There was a total investment of $812,000,000 in the 65 private power utilities, which had total sales of more than five billion kilowatt hours in 1927.

Gas companies report 1,219,168 consumers in 1927 as compared with 1,168,618 in 1926, an increase of 50,550. The 25 gas utilities had a total investment of $207,000,000, and total sales of 110,000,000,000 cubic feet.

Telephone companies report 2,045,039 subscribers stations in 1927 as compared with 1,877,862 in 1926, both figures including all the stations of the Pacific Telephone & Telegraph Company, an increase of 167,177.

Auto stages engaged in the transportation of passengers report operating 1,591 busses in 1927 and carrying 24,634,648 passengers as compared with 1,655 busses and 24,319,697 passengers in 1926.

No state has derived greater benefits from public utility regulation than has California, and in no state are the utilities in better shape, thanks largely to the consistent efforts of the Railroad Commission, since its reorganization in 1912, to protect not only the user of public utility service and the general public, but the investor in public utility securities, by preventing over-capitalization, or unwise investments of public utility capital.

That regulation of public utilities pays large dividends to the general public is apparent from a comparison of the figures showing the cost of such regulation, and the amount of reductions in rates ordered, or of increases denied as shown by the annual report of the Railroad Commission recently compiled.

The total income from California business of the public utilities operating within the state was $591,988,000 in 1927. The amount expended by the Railroad Commission in the regulation of these utilities during the fiscal year 1927-28 was $518,104.38.

Reductions in rates aggregated $3,392,458 during the period from December 15, 1927, and June 30, 1928, when a careful compilation was kept by the Commission. A conservative estimate shows that rate reductions for the entire fiscal year amounted to a net amount of at least $3,500,000. These figures would include numerous transportation rate adjustments not included in the Commission's tabulation of formal rate actions.

It is apparent, therefore, that it has cost approximately one dollar to every one thousand dollars of their revenue within the state to regulate the utilities in California. On the other hand for every dollar expended by the Railroad Commission in regulating the utilities, there has been returned to the rate payers $7 in reduced utility charges—irrespective of any savings

accruing because of the refusal of the Commission to sanction requested increases in rates, or the part played by the Commission in winning substantial reductions in interstate rates.

There are no reliable figures available to show what savings have been accomplished for the citizens of California through the equitable adjustment of the rates by the Railroad Commission, since its organization, but it is well within the facts to state that since the reorganization of the Commission in 1912 the record of every year, with the possible exception of those of the World War and immediately thereafter, make as satisfactory a record for the cause of regulation, as is shown by the fiscal year ending June 30, 1928.

DURING the period since its reorganization, the Railroad Commission has been instrumental in bringing about some very large reductions in interstate freight and express rates, which have been conservatively estimated to have resulted in savings of more than ten million dollars a year to shippers and receivers of freight and express.

An exceptionally gratifying record has been made during the last year by electric utilities under the jurisdiction of the Commission in voluntarily reducing their rates without formal proceedings on the part of the Commission, in order to adjust their charges to changing conditions and cost of production, and especially increased usage in both urban and agricultural areas.

INFORMAL complaints from patrons against rates, service or practices of public utilities reached the lowest level during 1927-28 of any year since the World War. This is taken as an indication of marked improvement in the relations of the utilities and their patrons. There has been a steady decrease in these complaints since the peak was reached in 1923-24, when there were 6315, until the present fiscal year, when there were but 2601. There were 317 complaints involving disputed bills for service. Deposits made with the Commission of the amount of these contested bills aggregated $47,430.91. All of these were adjusted by the Commission to the general satisfaction of both the complainants and the utilities. The total number of informal complaints investigated by the Commission from January 1, 1912 to June 30, 1928, was 54,446, while the number of disputed bills adjusted was 3851.

THROUGH the medium of informal complaints many matters have been settled satisfactorily without delay and expense to the complainants that would have incurred had it been necessary to bring formal proceedings.

In a number of cases informal complaints have developed into formal proceedings of widespread importance, due to the thoroughness with which the Commission pursues such consumer complaints to a logical conclusion. In one instance an informal complaint as to water service resulted in an adjustment whereby the utility, after resisting the Commission's jurisdiction, and losing its fight in the courts, agreed to build, and to turn over to the consumers, without cost to them for their opera-

tion, a water system costing upwards of $75,000.

THE excellent spirit of co-operation between the California Farm Bureau Federation and the Commission was again in evidence during the last fiscal year in the adjustment of a large number of complaints informally. Some of these informal adjustments represent actual savings to agricultural users of utility service amounting to hundreds of thousands of dollars. Refunds already made voluntarily by electric utilities to agricultural consumers, because of readjustments in the rules and charges governing electric line extensions, amount to approximately five hundred thousand dollars during the last twelve months.

CALIFORNIA shippers and producers of agricultural products will benefit to the extent of millions of dollars during the 1928 shipping season as the result of activities on their behalf by the Railroad Commission, according to the rate expert of the Commission.

In a decision rendered the first part of last year, the Commission drastically reduced all refrigeration charges maintained by the rail lines throughout the state for the protection of butter, cheese, eggs, and dressed poultry. The reductions are applicable on every shipment of these commodities moving within the state of California, and varied from $5 per car to approximately thirty dollars per car, according to the length of the haul and the particular territory traversed. This decision alone has resulted in the saving of thousands of dollars annually to the shippers of butter, eggs, cheese, and dressed poultry.

Another adjustment involving an extensive territory was made in the rates on grain and flour from the Sacramento Valley and San Francisco Bay points to points in the San Joaquin Valley, Southern California, and the Imperial Valley. The reductions made under this adjustment are substantial and will result in a considerable saving to both the farmer and the miller. For example, the flour rate from Redding to Fresno was reduced from 48½ cents to 42 cents; from Redding to San Bernardino it was reduced from 69 cents to 50 cents; and from Redding to Calexico from 82 cents to 57½ cents.

Likewise the Commission has readjusted the rates on grain and grain products from Oakland to points in the San Joaquin Valley, reducing the existing rates from 5 to 20 cents per ton, the reduction depending upon the distance of haul. A somewhat similar reduction was made in the rates on grain and grain products from the West Side San Joaquin Valley points to Oakland.

IN addition to general rate readjustments such as just above referred to, the Commission has materially reduced the rates between individual points, and in many cases where the rates have been found to be unreasonable in the past, has awarded reparation. This has been done on such commodities as cattle, fresh fruits, almonds, fruit boxes, vegetables, dried fruits, fertilizer, wool, and box shooks.

Within the last few months the Commission has awarded reparation

on over 500 carloads of the commodities just named. The amount of reparation awarded will vary from $5 or $6 a car to $40 or $50 a car. In some cases the Commission has reduced the rate nearly 50 per cent. As illustrative, a shipper was charged on about 15 carloads of almonds from Oakdale to Sacramento a rate of 31 cents, which was reduced to 17 cents, and the carrier ordered to refund the difference between the rate paid and the rate found reasonable by the Commission.

To promote safety of operation in all public utilities subject to its jurisdiction, the Railroad Commission has been unremitting in its efforts. The result has been that California can justly claim to be in the very forefront of the states in the effort to promote safety on the highway, on the lines of the various common carriers, and in the operation of the industries in the public service.

The Commission is always glad to lend the advice and services of its technical experts to municipalities and counties, or the industries over which it has jurisdiction, to assist in planning safety measures relating to public utility operation, and especially the protection of street and highway traffic from grade crossing hazards. With the advent of the high speed automobile, and the enormous increase in ownership of cars, the hazard from grade crossings has increased until it is now a subject of major consideration.

There have been frequent demands for the entire elimination of grade crossings, but the expense of such a remedy is so staggering that no effective plan has yet been devised for financing it. The fact that the industrial and commercial life of the state has grown to such enormous proportions, demanding the most elaborate and expeditious means of transportation, has served further to complicate the grade crossing problem.

In ameliorating the traffic hazards, the Railroad Commission has done intensive work also. In addition to ordering the elimination of many of the most dangerous and highly-traveled grade crossings at a cost of many millions of dollars, the Commission has issued a number of general orders to establish standards of protection of grade crossings, regulating overhead and side clearances on railroads and street railways. It has, in many cases, directed the removal of buildings, fences, trees, or other objects impairing the view of grade crossings by operators of trains and other common carriers, and drivers of privately owned autos, trucks, or other vehicles.

The most recent of these general orders was the one which fixed new standards of grade crossing protective signs and devices, giving the railroads and street railways until July 1, 1929, to bring all existing signs, warning devices and crossings up to the newer and more approved standards.

After making individual orders for the correcting of impaired clearances on more than one hundred railroad tracks, crossings, and overhead structures, the Commission revised its general order that fixed standards for the prevention of such impaired clearances. This new gen-

eral order on clearances is designed to keep the safety regulations of this state up to high standard and consistent with modern conditions.

The record of safety of railroad operations in this state is remarkably good, due no doubt in part to the strict safety regulations that have been ordered and administered by the Commission during the last fifteen years.

The new order relating to the elimination of impaired overhead and side clearances will further reduce deaths and injuries to railway employees through being struck by projecting objects or buildings along the rights of way, especially at freight stations and crossings. It will prohibit common carrier railroads from operating over private tracks and spurs not conforming to the same regulations as public carrier tracks.

If the results of these orders are as striking as those following the inspection by engineers of the Railroad Commission of overhead electric line construction, and the ordering by the Commission of the removal of all infractions of its standards of overhead electric line construction, the Commission will feel rewarded for the long and intensive study given to the preparation of the general orders on grade crossing protection, and clearances on railroads and street railways.

As a result of the inspections of over head electric line construction 350,000 potential causes of accidents to utility operatives or the general public were corrected upon orders of the Commission. Due to the excellence of this inspection and the cooperation of the utilities and municipalities in obeying the Commission's orders the number of accidents due to defective and improper electric line construction has been reduced to a minimum. In fact the deaths due to electrocution of electrical workers from avoidable causes, have become so rare as to be practically negligible.

One of the most valuable safety works performed by the Railroad Commission in relation to the operation of railroads, has resulted from the issuance of its general order regulating interlocking plants at important railroad intersections. The enforcement of this order, and the ordering of the construction of a large number of such interlocking plants has resulted in the elimination of railroad accidents at such intersections in California.

In addition to requiring new interlocking plants to be constructed in accordance with high standards, all changes in existing plants are scrutinized carefully, and inspection is made frequently to insure that all interlockers are maintained properly and safely.

Potential causes of accidents have also been ordered removed by the Commission as the result of recommendations by its engineers after investigations of grade crossing and other railroad accidents, with the result that there has been a steady reduction in the number of serious accidents on railroads in California.

Ill Will That Was Converted to Good Will

What William G. Wood Did to Win the Coffin Medal for the Virginia Electric Light and Power Co.

BY M. H. GLAZER

A FEW years ago the street railway company of Richmond, Virginia, was anathema to the residents of that city. The city council and the newspapers were constantly fighting it. No matter how reasonable the requests of its management, they were almost always denied. Every fare was a knocker. To add to its burdens an unsavory public opinion had been developed through antagonistic newspaper comment.

But that was in the days of the old ownership.

In 1925, however, the company, including its properties in Norfolk, Portsmouth and Petersburg, was bought by Stone & Webster, Inc. The first step of the new owners was to put experienced public utility men in charge. Among them was a young man, still in his thirties, named William G. Wood.

Young Mr. Wood had been studying street railway companies and how to run them ever since he joined Stone & Webster in 1907 after his graduation from Georgia Tech. In those early days, according to his own confession, he didn't know whether Stone & Webster manufactured shoes or were in the codfish business; he knew only that they were in Boston, and he wanted to get there. For fifteen years before he was sent to Richmond he had served in various executive capacities the Stone & Webster properties in Houston, El Paso, and Galveston. The official designation of Mr. Wood's new job was vice-president of the Virginia Electric Light & Power Company.

Early in his career Mr. Wood learned that the public must be served, and that the better it is served, the greater the progress of the company offering the service. He was strictly public conscious in his philosophy of traction management. He also was a great believer in heart-to-heart talks.

WHEN the new management took hold of the Richmond Street Railways, the company was in a sad state. There was a discouraging misunderstanding between the company and the public. Ruinous competition was being invited and fostered in all the cities served by the railway system. The physical property as well as

the *morale* of the system were rapidly deteriorating. Renewals of expiring franchises could not be secured; necessary fare increases could not be obtained. Richmond, the birthplace and cradle of the trolley railway, seemed doomed to contribute spectacularly to the decline of the street railway industry.

It was evident that public confidence and respect had to be built up from the beginning. In view of the situation that had existed, the task was difficult. The new management soon decided that to win public confidence, it had to earn it by making evident in a material manner its faith in the essential nature of its business and the ultimate fairness of the public. This the company proceeded to do by modernizing its equipment, providing new track facilities and otherwise improving its service without first demanding concessions on the part of the public.

Through group meetings, individual contacts, newspaper and other forms of publicity, the new management presented to the public and employees alike its ideals, hopes, and plans for rendering a good transportation service at the lowest possible cost. Suggestions and criticisms were invited; co-operation was solicited. If the solution were to be successful, the public, the employees and the management had to work together.

THE spirit in which the new management took hold met with a responsive chord on the part of the citizens. The newspapermen were taken into the confidence of the street railway executives. Their cryptic headlines changed from "Raps" and "Scores" to "Lauds" and "Praises." Indeed, one of the first acts of the representatives of the new managers, upon arriving in the Virginia territory, was to call personally upon all the daily newspapers throughout the system and to assure them that the policy of the management would be one of frankness and co-operation with the press as well as with the public.

ABOUT two years ago, Mr. Wood, who had been vice-president of the new company, succeeded Luke C. Bradley as president. The progress of the company during the first year of his incumbency was outstanding in the street railway industry.

Mr. Wood is a big broad-shouldered, slow-spoken, affable South Carolinian, with a Hooverian propensity for getting things done. He is an open-door-policy executive who resents his telephone calls being relayed to a half dozen secretaries and assistants. He greets friends and strangers alike with a frankness and a fervor that is disarming. He combines with rare horse-sense a high regard for the honesty and fairness of his fellow citizens. He is only forty-one now, despite his graying hairs; he says they are "public utility gray." Talk to him, talk to his men, talk to the people of Richmond, and you will discover why his company won the coveted Charles A. Coffin 1927 award "for distinguished contribution to the development of electric transportation for the convenience of the public and the benefit of the industry."

The street-car-riding public doesn't wear a grouch any more; it continually boosts its transportation system.

HERE are some of the reasons why the company awarded the Coffin medal:

1: It transformed a public distrust into a public spirit of respect and co-operation.

2: It developed employees who were responsive to the ideals and requirements of good public service through an intensive program of training and education.

3: It secured new franchises and favorable bus ordinances which made possible unified transportation service that involved extensive rerouteing of lines and increases in fares.

4: It increased gross earnings over the previous year 6.30 per cent and reduced operating expenses 1.77 per cent, thus increasing balance available for return on investment, after depreciation, by 60.94 per cent.

5: It increased the number of riders compared, with previous year by 3.6 per cent, in the face of greater number of private automobiles and declining business conditions throughout the territory served.

6: It put on 30 new and 66 modernized cars and 114 new and 82 modernized busses — improvements that helped to revolutionize the character and quality of service rendered the public.

7: It gave the public more reliable and faster service at lower cost through the introduction of new ideas, efficiencies and economies in operation.

8: It made partners, through stock sales, of a large number of its hitherto unfriendly critics, and at the same time financed the company on the soundest and cheapest basis in its history.

9: It earned a return of 11.6 per cent, before depreciation, on $3,800,000 of new money invested.

10: It increased wages and improved the working conditions of its employees.

THE company has been able to steer a successful course between the Scylla and Charybdis of regulatory powers. As it is answerable both to the Virginia State Corporation Commission and to the municipalities in which it operates, it has weathered the storms of regulation and built up a highly satisfactory electric railway and bus system in Richmond, Norfolk, Portsmouth and Petersburg, serving a population of approximately a half million.

Mr. Wood, lays claim to no false modesty when speaking of the accomplishments of his company. The Coffin award also is given in the electric light and power field; inasmuch as the Virginia Company operates both power and railway, bids were submitted for the award in both branches of the business. When Mr. Wood responded to the presentation of the award at the last meeting of the American Electric Railway Association in Cleveland, he did so with regrets, he said, because he had hoped his company would win both awards.

Bringing the Coffin award to Virginia was a matter of pride not only to the officers and employees of the company but also to the people of Richmond and to the other communities served by the company. Last month the Chamber of Commerce of Richmond gave a testimonial dinner to the officers of the company in celebration of the Coffin award. The

leading citizens of the community were present. The Virginia Electric & Power Company has ceased to be a subject of derision; it has become a matter of pride.

Mr. Wood has given the human touch to the management of the company. Perhaps it is this gift more than any other, which has contributed so largely in making the company popular and successful. The "little things" the company does appeal to the people; even the placards it places in its busses and street cars please the people. Here is one, for example, that caught the eyes of patrons along about Thanksgiving Day:

"Let us give thanks for true and loyal friends; for home and family ties; for work, for play; for beauty, and the grace that laughter lends to toil or trial."

When Reductions in Rates Bring Criticism

CHANGES in utility rates, either upward or downward, seem to be unpopular with a large portion of the rate payers.

Even when utility companies offer to reduce their rates they may soon be the object of attack. In scores of cities and towns throughout the country during the last few months proposals to revise gas and electric schedules downward have been made by the companies, and the reaction to these announcements are often far from favorable. Newspaper headings tell the stories from day to day in some such way as this: "Rate production only for large consumers," or "Small consumers hit by new rates," or "New rate hit by head of Consumers' League," or "Cities are up in arms in defense of the small gas users."

PUBLIC officials often rush into print with some such statement as this: "The city law department will fight every inch of the way to protect the interest of the working man in the proposed readjustment of rates. The proposed change in rates is a discrimination against the poorer class of people." Opposition of this kind, however, does not always develop. In some instances city officials make a careful study of the proposed rates and co-operate in an endeavor to establish an equitable tariff which apportions the cost of service fairly to those who create the expense.

It is always difficult to formulate schedules for different classes of consumers that will be fair and nondiscriminatory. This is especially true of gas industry, which started out with unscientific schedules. Under the old method of charging, a large number of gas consumers received their service at less than cost and at the expense of other consumers. Every attempt of the companies to make this class of consumers pay for what they use is met with protest.

But the companies will probably continue to fight for scientific rates. Such rates are for the benefit of consumers as a whole, whether they know it or not.

—DAVID LAY

Who Will Regulate Radio Broadcasting—and How?

The broadcasting industry has grown with such astonishing rapidity that only make-shift measures have yet been devised to control its activities; the courts have yet to determine to what extent, if any, it constitutes a "public utility." This article outlines what some of the problems are that still confront the courts, the Commissions, and the broadcast industry itself.

By FRANCIS X. WELCH

REGULATION of air utilities, aeronautic and radio is still very much in swaddling clothes. One can see at a glance, however, that aviation is the much simpler problem because it is so much like other forms of common carriers. Accordingly, the law of the air as applied to aeroplanes is rapidly developing into a fairly workable condition. The effect of the Federal Aeronautic Act of 1926 and the resulting regulation of the Commerce Department as well as the action of the various State Public Service Commissions in taking one of these baby twins under their wings indicates that the aeroplane as a commercial utility will be settled, defined, and regulated in a very short time, but the fact remains that the other twin is in a bad way legally, and every day and in every way this problem is getting bigger and bigger.

BEFORE trying to analyze or diagnose the complications of the radio problem it would probably be more logical to dissect it. What makes it grow? What supports it? Why is such entertainment free? Or in plain and simple words, who pays the fiddler, and why?

Radio broadcasting in America has developed along lines quite different from those in Europe and in the Orient. All over the continent, broadcasting stations have developed along the lines of "let him pay who receives." The stations are supported by a system of taxation on receiving sets and are operated for the most part by the government. In comparing the European system to our own, it must be remembered that the operation of stations on the continent by a private company for publicity purposes would be a doubtful enterprise. It certainly would not pay as well as it does over here. Then, too, proceeds from commercial broadcasting of part time programs would be much less than in America. The main reason is because it is questionable whether an European station can

broadcast to a big enough market, in a language which will be understood by enough persons.

For instance, if an Italian automobile tire company wanted to put on an advertising program at Genoa two questions would confront the manufacturer:

First, are there enough automobile owners, ready, willing, and able to buy within the receptive conditions and range of the station to constitute a good prospective market?

Secondly (assuming that the first question could be answered in the affirmative), is the number of such owners, who at the same time, understand the Italian language large enough to bother with putting on the program?

Language is a real problem in Europe. A certain Swiss station is picked up by a regular audience speaking ten different languages, and it is necessary to rotate the various tongues used. Of course, as long as the music is going every one is pleased. Music is an international language especially with the artistic European, but music alone cannot sell tires or any other commodity. This is probably one of the reasons why the respective governments on the continent control most of the broadcasting and have to charge for it; namely, if they did not do it, nobody else would.

In Japan a curious method of supporting broadcasting is reported. Receiving sets in that country are tuned only to the nearest station and the buyers must pay a periodical fee during the time they operate their sets. This may or may not be working out all right, but there is a strong suspicion that any smart electrician with a few feet of wire and a little spare time could be doing a good bit of radio bootlegging in the Orient. On the other hand Japanese programs may be of such a nature that the citizens think one station is about as good as another. It is certain, however, that such a system could not work out here where the average bright American boy has already built one or more receiving sets before completing high school.

Here in our own land we have an entirely different situation. America, including Canada, is the greatest potential market in the world and the English language is universally understood. The weakest station can hardly broadcast the virtues of a single commodity without making contact with a potential market sufficient to swamp the sponsors with sales orders if it is properly moved. The important detail then, is to prepare programs that will appeal to the buying public. In view of this circumstance it is a small wonder that, speaking in terms of radio, America is literally the land of the free. Manufacturers of shoes, furniture, chewing gum and every other imaginable commodity have found that broadcasting is a cheap and effective advertising medium.

The appeal of the programs are as varied as the commodities advertised. Some merchants go directly to the public by "pushing" their goods with explanatory remarks during the program or else weaving directly into the program some reference to their wares. Others merely depend on the

good will of the listeners by sponsoring the transmission of some event of general interest, such as a football game. But still other business concerns construct and operate their own broadcasting stations and are apparently satisfied that the expense thereby incurred has more than made up the advertising value of the station. This can be shown by the fact that the United States Government operates only a handful of broadcasting stations which are used chiefly for the transmission of military and agricultural information, or else code signals. A mere 5 per cent of the stations are operated by clubs, churches, and societies; the balance are exclusively owned and operated by private commercial enterprises, such as department stores, hotels, and manufacturers in general.

ONE of the most interesting developments in the radio industry was the organization of the National Broadcasting Company. This company has been compared to the Associated Press and other national news services, and this analogy is striking in many ways. The company contracts with certain stations in stragetic points over a given area, such as the eastern part of the United States. When any event of sectional importance such as the World Series baseball game takes place it is broadcast from the originating station and so relayed by telephone to be rebroadcast from all "affiliated stations" in the hook-up. It may happen that two interesting events occur at once in New York. The National Broadcasting Company has developed two systems of hook-ups to take care of this situation. They are called the "red network" and the "blue network." Therefore while one football game is sent out over western New York by a Rochester station, another game may be picked up by listeners in the same area from a Buffalo station. What has been done for the east has also been done in other sections, and the national hook-ups during the recent political campaign were the greatest ever attempted. The National Broadcasting Company sells its time to anyone who will guarantee a reasonably interesting program; in turn the company pays the local station for the use of its facilities. In this respect it is sort of a "broadcasting broker," giving the use of its wide system and excellent organization to a single advertiser.

Like the press services the company is strictly nonpartisan and will sell its time without discrimination to class or creed as long as the proposed programs are not obviously offensive.

The Columbia Broadcasting System is another association of independent stations not affiliated with the National Broadcasting Company; it functions very much along the same lines and its existence is said to insure healthy competition and good programs for the public, just as one national press service helps to check another.

THE operators of some stations find that the proceeds from the sale of broadcasting time to local advertisers, as well as to the broadcasting chains pretty nearly pays for the operation of their plants; a few companies even report a fair profit. For the most part, however, these proceeds

are not quite sufficient to make broadcasting stand on its own feet as a business, and the operators usually charge off the difference to the advertising of their own company and from the large number that continue to operate, and apply for licenses, this arrangement must be fairly satisfactory.

UNTIL 1920 the regulation of the radio utility gave no trouble to anyone. A statute adopted back in 1912 when broadcasting was restricted to code signals, gave ample governmental control during the war. This law simply provided that no one should operate a broadcasting station without first obtaining a license from the Secretary of Commerce. But with the big radio boom of 1920, it seemed that the principal merchant at every cross roads in the country was seeking a place on the already overcrowded wave-band of the standard radio receiving set. This gave rise to the problem of "interference," which is simply the operation of two or more stations on the same wave length so as to confuse programs. The Secretary of Commerce bravely tried to police the air in a number of test cases, but on each occasion the Federal Court ruled against the Department. In the leading test case,* it was decided that the Secretary had no constitutional authority to refuse a license to a properly qualified applicant for a wave length, and that his only task was to assign the applicant one that would cause the least possible interference. The result of these decisions caused so much "pirating" and "wave jumping" and the radio air became such a bedlam of confusion that strong public sentiment for air policing has resulted in the recent radio act of 1927.

BUT how about the international aspect of radio regulation? Radio has raised grave international problems and there is a serious requirement for world-wide and uniform laws governing certain aspects of commercial radio. Whether this can yet be done through the forum of the League of Nations or through the medium of special international conventions is merely a matter of detail.

The biggest obstacle in the way of international radio regulation is the complete absence of precedents. Radio knows no boundary and the most stringent regulation will have to be made if decent behavior by small neighboring countries is to be observed. For instance, Russia has been accused of tossing Soviet propaganda into her neighbors' back yards. International supervision to prevent such activities will require the creation of an European Commission, ever active and with the authority of broad delegated powers.

Although no attempt has been made by European countries to control wave lengths, there is striking evidence of good will and co-operation both as to the allocation of wave lengths by gentlemen's agreements as well as the preservation of international goodwill through strict censorship.

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* Hoover *v.* The Inter-City Radio Company, 54 D. C. Appeals, 339.

For other decisions, see United States *v.* Zenith Radio Corp. 12 F. (2d) 614, Chicago Tribune Co. *v.* Oak Leaves Broadcasting Co., Circuit Court of Cook County, Ill.—Gen. No. B–126864. (Unreported 1926.)

Of course there are exceptions. Lieutenant Colonel Davis, states:

"There are some exceptions to this prevelant spirit of co-operation, however, and occasionally one nation throws a monkey wrench into the broadcasting machinery. For example, during the general strike in England, the only means of disseminating information which existed between the government and the public was the broadcasting station. The most important of these was Daventry, transmitting on 1,600 meters. It was found, however, that the transmissions during the time of the strike were subject to insurmountable interference from another station, which afterwards showed itself to be Moscow. Whether the Russians were interfering deliberately or not is beside the point. The fact remains that one country can entirely spoil the transmissions from one or more stations in a foreign country in Europe, if it desires to do so.

"Last year, news items from Bucharest indicated that the Russian Radio Broadcasting Station at Moscow was broadcasting criticisms of the Roumanian government and was appealing to its Roumanian audience to start a revolution. The War Minister of Roumania instructed one of the military radio stations to set up a counter 'buzzing' whenever the Soviet News Station began to broadcast. In the case of the Daventry incident, it was not known whether the interference from Moscow was intentional or not. The Bucharest example presents quite the different situation of one government deliberately intruding itself through the medium of radio into the internal workings of another country to the latter's detriment. The necessity for the establishment of international rules and regulations is therefore very evident." *

* 15 *Georgetown Law Journal*, 474.

OUR country, for unknown reasons, has been singularly backward in joining these international families. Mere co-operation with international agreements could not possibly affect our sovereign radio rights in any way. More especially have we been late in rebuking stations who have violated international goodwill and ordinary decency by appropriating Canadian wave lengths. Canada is supposed to have a gentlemen's agreement with our Commerce Department of which the Dominion Government has heretofore been very considerate, but has recently shown signs of reciprocating violations from this side of the border. This phase of radio regulation has attracted widespread comment. Mr. Jack Binns, now a popular radio columnist, says:

"Our greatest blunder, however, is the failure properly to consider the sovereign rights of contiguous and near-by nations. We have been prone to look with scorn upon European radio development, yet when the possibility of interference loomed there the twenty-two countries got together under the aegis of the League of Nations and split up the available wave lengths among themselves on the basis of population and geographical location. Having accomplished this, they established the International Radio Union and put a dictator at the head of it to administer the agreement. It is inconceivable that any condition even approaching ours can develop in Europe.

"The latest North American country to begin broadcasting is Newfoundland. A 500-watt station has been established at St. John's. It will cause interference with American stations around the 395-meter wave. Newfoundland is a sovereign state and can utilize as many wave lengths as it pleases irrespective of

public opinions or convenience in this country. The same is true of Canada and Mexico. What we need immediately is a North American conference, as suggested by Secretary Hoover, to agree upon an allotment of wave lengths so that the interests of the entire continent will be best served without rancor or interference." *

THE main object of the Federal Radio Act of 1927 was to remedy the constitutional defect of the old 1912 Statute. The principal provisions were the creation of a Federal Radio Commission composed of five members, known as the Federal Radio Commission, and the enumeration of the Commission's powers. The Commission is to pass on all applications for licenses and to determine "public necessity and convenience" for broadcasting proposed therein. The Commission is to classify stations and assign frequencies as well as control power and supervise chain broadcasting. The last power is for the prevention of air monopoly by any single broadcasting system. The police powers given to the Commission are very broad and are yet to be adequately tested in the courts.

ONE of the most interesting provisions of the act is that dealing with censorship. It is specifically stated that "Nothing in this act shall be understood or construed to give the licensing authority the power of censorship." Another section provides that a station allowing a political candidate to broadcast must afford equal facilities to other candidates for the same office, and it may impose no restrictions on what such candidate might say. Commenting on this prohibition the *Columbia Law Review* says:

> "The power to control the content of a broadcasting program is entirely in the hands of the broadcaster. Yet it may be argued that 'public convenience and necessity' require the denial of a license to a station in an already crowded area which has previously broadcast speeches urging religious intolerance, or, indeed, to one whose programs have merely been dull. The radio is a powerful agency for propaganda, and instances are not lacking of the denial by broadcasters of their facilities to persons representing minority views. It would clearly be impracticable to declare a broadcasting station a public utility and require it to take all material offered, but the standard of 'public convenience and necessity' seems to afford a sufficiently effective device to guarantee the freedom of the air. What the character of its program is, and, more particularly, whether on controversial questions a station has given fair representation to both sides would easily seem important elements in the determination of whether or not it should be permitted to continue broadcasting." *

In the Senate hearings on the present act an attorney for the American Civil Liberties Union cited instances of such denials to the Foreign Policy Association, to the Union itself and to Mr. Hudson Maxim, who was allowed to speak for an hour against the Volstead Act only to find he had been cut off for half that time. More recently a Democratic and a Socialist Congressman have complained in the newspapers that their addresses had been censored by a station before they were permitted to broadcast.†

* *Collier's Weekly*, October 3, 1928.

* 27 *Columbia Law Review*, 732 (1927).

† Hearings before Senate Interstate Commerce Committees, 1754, 69 Cong. 2d Sess. 1926.

THE 1927 speculation of the author of the foregoing passage dealing with the eliminating of stations of doubtful purpose because of alleged lack of public convenience might be remembered in view of the recent action of the Radio Commission on an application of the American Association for the Advancement of Atheism Inc. to establish a broadcasting station in New York city to "disseminate the philosophy of aethism." It was found that the radio terminal in the vicinity of New York city was greatly overcrowded so that the Commission did not grant an additional license in that quarter. Still more recently, however, the Commission has refused an application of a certain company that wanted to go on the air "to promote a better understanding between the public and the utilities in general." The application was objected to on the ground of "utility propaganda." This time the Federal Commission also denied the application on the ground of overcrowded broadcasting area but gave as an additional reason that "the application indicated an intention to carry on a type of broadcasting now being extensively condemned after revelations uncovered by the Federal Trade Commission."

THE success of the Radio Act to date has not been startling, but more recent action of the Commission gives promise of a greater effort at air policing in the future. When the act became effective the air was already much overcrowded; it has been estimated that in March, 1927, there were 737 regular broadcasting stations in operation throughout the country, and applications were on file with the Secretary for many more. Divide this number by the 89 available wave lengths in the normal broadcasting band and you will have some idea of the amount of interference throughout the country. It is the prevailing impression that 500 stations is a maximum that should be allowed, and that these should be allocated to separate locations and subject to time and power regulation in accordance with general public convenience and receiving comfort.

The Commission has been fairly vigorous in keeping unwarranted newcomers from the air, but in eliminating the old timers, that is, operators who were broadcasting before the effective date of the 1927 Act, the Commission has been very, (and in the opinion of some), unduly timid. This may be unquestionably due to the doubt expressed by many lawyers as to the constitutional right of the Commission to eliminate operators who have vested rights in the air. It might be added that the original theory of the 1927 Radio Act was that nobody had any vested rights in the air and that the ether belonged to the people of the United States as a whole.* This theory had its origin in a joint resolution which was specifically repealed by the present act.† As a result all those stations that came into existence between 1912 and 1927 claim a property right in a certain channel of the ether by reason of their construction and investment and the establishment of a regular

* Act of December 8, 1926, 69th Congressional Congress 2nd Session.

† Act of February 27, 1927, 69th Congress 2nd Session, Public Doc. No. 632, Chap. 39.

audience, as well as the assumption of contract obligations to sell future time.

It is well known that in automobile regulation, the convenience and necessity of bus operators which had been doing business regularly since a time prior to the effective date of the regulatory statute, is generally presumed. No such presumption will be satisfactory in radio, because if the Commission is going to bring any order of the present chaos, about three hundred of the old stations will have to be ordered to get off the air. So it will be seen that the Commission is on some rather ticklish constitutional ground. Nevertheless Judge S. B. Davis commenting on the bashful attitude of the Radio Commission in a recent article stated:

> "Certainly the Commission should proceed on the theory that the law which creates it is constitutional and that it has the power to do what the law tells it to do. To take the opposite theory is to negative its own right to exist."

It has been suggested that all the stations that went into operation between 1912 and 1927 should be treated as trespassers and should be placed under the burden of proof of showing that public convenience and necessity requires their existence.

However the Commission finally makes up its mind to deal with this problem (and there is recent indication that the Commission is going to deal very severely with it), there is some suggestion that the radio problem might eventually solve itself, although most of us would be unwilling to wait that long. Competition, the age-old economic force, which has so long been the policeman of every other kind of business, appears to be making his debut at the microphone. How competition can effect the radio industry has been briefly analyzed by the same able Mr. Binns previously mentioned. He said:

> "Will the chain system ultimately drive the independent stations off the air? That vital question embraces the great fear of many people, and it was undoubtedly the impelling motive back of the last radio law enacted by Congress. It is a fair question and one that requires attention. The present condition of overcrowding in the air is merely a temporary one, even though it has caused the radio commissioners many sleepless nights. Harsh economic laws will soon compel many stations to sign off permanently, and then the question I have cited at the beginning of this paragraph will become an important one indeed. If the independent stations will take advantage of the possibilities that are available, they should survive.
>
> "In the first place, the chains will succeed just so long as they render an efficient service, which necessarily means programs of high quality and real merit. The degree of their success depends upon the competition confronting them from other chains or from independent stations. It is in this respect that the independent studio manager has his greatest opportunity. He is not confronted by the same circumstances nor the inhibitions of the chain system, and therefore, he can show more initiative by developing unique presentations entirely free from the stereotypes that are rapidly becoming fixtures on the air." *

It might be noted that Mr. Binn's prediction was made slightly previ-

* *Collier's Weekly.*

ous to the unquestionable success of the Columbia Broadcasting System, an association of independent stations.

THE outlook of the radio industry as we now know it is fairly encouraging. There is every indication even should the existing radio act break down constitutionally, that public sentiment will inevitably compel the adoption of some law that will work, and will permit the existence of a real air policeman. At all cost the American public will see to it that the air traffic is cleared up.

In the matter of receiving sets, the radio manufacturers are to be congratulated. Some time ago there was a peculiar type of receivers that we might call, for want of a better name, the "anti-social set." This set was at once a receiving and a transmitting set, and as a result whenever it was tuned in or out, and very often while it was merely operating, a neighboring radio fan would be disturbed with howls and squeals caused by the "anti-social set." The set however, was a very good performer considering ether traffic congestion and general receptive conditions, and above all, it was a very economical set. Nevertheless, the leading manufacturers were far-visioned enough to see that the development of this type of equipment would ruin the radio business for everybody, and antagonize the public generally. By gentlemen's agreement, the anti-social set has been practically eliminated from the present market without a single court action being required, or a single law being passed. It is such spirit as this that makes most of us have faith in the millenium of American business.

ANOTHER item of future radio development that must be considered is power-line interference. Already real estate operators are advertising subdivisions as having "excellent radio reception." The interference from street railway trolleys has caused so much dissatisfaction that some patrons who previously opposed the substitution of busses on certain unprofitable rail lines, are now welcoming them. They are glad to be rid of the street cars with their periodic trolley static. The effect of power-line static on rural radio reception has already been considered as an element of damage in the condemnation of land for the construction of transmission lines. It used to be that putting a power line over a farmer's land meant nothing to him, and he was glad to permit it for a few dollars. The power companies now find that rural land owners are commencing to value their radio rights more and more.

WHILE the outlook in the radio industry proper might be encouraging from a lawyer's point of view, television threatens to tear the whole problem up again. Television is just around the corner. A few more years should see this art in use for theaters and exhibitions and one can only speculate as to just how far off popular reception is. When television becomes popular, free reception will probably vanish. Perfected television if possible will eliminate to a great extent the motion pictures and the grand operas, thereby putting a premium on the surviving talent that is to be used in broadcasting. The expense will be enormous and proba-

bly more than present advertisers could ever bear.

The late Mr. Tex Rickard, the well-known fight promoter, in bemoaning a recent financial loss from the Tunney-Heeney fight laid the whole blame on the radio and promised that the next heavy-weight championship fight would not be broadcast unless heavy royalties were forthcoming for the concession. Perhaps he was preparing for himself and his successors to charge many thousands for the next radio concession. What advertiser will pay for this?

With this situation in mind consider what Mr. Gatti-Cazzaza will say when television operators want to broadcast "Rigoletto" from the stage of the Metropolitan Opera Company. The shrewd metropolitan impressario perhaps believes that television broadcasting of grand opera will empty the diamond horse-shoe and make the great auditorium deserted. Who will pay for this? Certainly not the advertisers. A sales tax on receiving sets has even been suggested.

THERE is evidence that television is more sensitive to power interference than the ordinary radio reception. The cities of the future might have to be developed and the present cities might have to be reconstructed so as to bring all high voltage wires in through concentrated channels over the least valuable portion of the cities in order that residential sections will be free from television interference, just as at the present time railroads are all being concentrated at the entrance of cities to eliminate unnecessary traffic interference.

As to state regulation, little need be said. Radio broadcasting is interstate commerce over which the state has no control. A Federal Court in holding void an attempted taxation by a municipality of an amateur broadcaster as an interference with interstate commerce, said that it was impossible to conceive of a station, however weak, which did not penetrate state border liens.* A western state has required all broadcasting stations to obtain a "certificate of convenience and necessity" from the State Public Utilities Commission. These two facts combined with the rapidly increasing necessity for the radio in popular communication indicates that sooner or later the radio will officially be declared a public utility, notwithstanding the fact that its service is free to receivers.

As for state censorship there is but one case reported; that is a decision of an inferior Pennsylvanian tribunal which prohibited the broadcasting of a baseball game on Sunday in controvention of a local blue law, notwithstanding the fact that the game was being lawfully played in the state of New York. There is considerable doubt about the force of the decision but the states have unquestionable police power to put a stop to any local broadcasting that violates existing laws such as obscene, inflammatory, or scurrilous programs.

Congress also, in view of the interstate character of broadcasting, probably has such criminal jurisdiction, just as that exercised in the White Slave Act, but so far, no Federal criminal regulation has been attempted.

* Whitehurst *v.* Grimes, 21 Fed. (2d) 787.

Hon. Leon O. Whitsell

Chairman of the California Railroad Commission

Hon. Leon O. Whitsell, who is president of the California Railroad Commission, was born in Centerville, Iowa, July 10, 1876. His grandparents were among the very earliest settlers of Iowa; they came from Ohio by wagon.

Commissioner Whitsell obtained his preparatory education at the Farmington High School, from which he graduated. He then studied law in Centerville, Iowa, with the Hon. Claude R. Porter, now a member of the Interstate Commerce Commission. He passed the Iowa bar examination in the Spring of 1900 and began the practice of law in Idaho.

Commissioner Whitsell's practice has included some highly important litigation. In 1906 he was retained in the Mayer, Haywood and Pettibone cases in Boise, Idaho. He continued to work for the Western Federation in Idaho and Colorado until 1909 when he took up a unit on the Truckee-Carson Project in 1910 and personally developed it. He was also retained as attorney for the miners during the Masaba Range strike in 1916, in Minnesota.

He went to Orange county, California, and engaged in the raising of oranges and lemons from 1915 until 1925. There he became a member of the Board of Supervisors, in which capacity he served for three years. He was also president of the Orange County Community Chamber of Commerce.

Commissioner Whitsell was appointed to the Commission as a "dirt farmer" by Governor Friend W. Richardson on July 28, 1925, to fill the unexpired term of Hon. Edgerton Shore. He was reappointed by Governor Richardson for a full term of six years on January 1, 1927, and on January 1, 1928 was elected president of the California Railroad Commission. Commissioner Whitsell is a member of the Republican party.

Outside of professional and business activities Commissioner Whitsell has been prominent in fraternal affairs. He is past master of Orange Grove Lodge F. & A. M. of Orange, California; high priest of the Orange chapter Royal Arch Masons; thirty-second degree Mason; a Knight Templar; a member of Al Malaikah Shrine, Los Angeles; member of the Elks and Knights of Pythias; member of the Orange Rotary Club; senior grand deacon of the Grand Lodge of Masons of California; and a member of the California Masonic History Committee of the Grand Lodge.

Commissioner Whitsell is married and has two sons. His hobbies are California history, Spanish cooking, and trout fishing. He played football in his youth and now plays golf.

The March of Events

Radio Broadcasting Stations as Public Utilities

THE question whether radio broadcasting stations are public utilities has been raised in a brief filed by attorney Louis G. Caldwell in the Federal District Court for the Northern District of Illinois in injunction proceedings by the Radio Commission to prohibit station WOK-WMBB, Homewood, Illinois, from operating on a channel not authorized by the Commission. Mr. Caldwell argues that the phrase in the Radio Act of 1927 must be broad enough to include not only businesses which are undoubtedly public utilities, but also others which cannot possibly be and still others which may or may not be; that in broadcasting the emphasis is on receiving not on messages merely, but on intangible commodities consisting of information, instruction and amusement; that in this sense broadcasting is a public utility by the laws of nature, because once a broadcast station is in operation it can hardly prevent any member of the public from receiving its programs.

Long Distance Telephone Rates Reduced

A REDUCTION in long distance telephone rates during the daytime, which will save telephone users of the country approximately $5,000,000 a year, will become effective February 1st, it has been announced. Rate reductions are also to be made in Canada. This will include station-to-station rates and also person-to-person rates. Evening and night rates will remain unchanged.

The rates will be cut from 5 to 25 cents on charges for station-to-station calls between points from 130 to approximately 1500 miles apart. The reductions are to run as high as 13 per cent in middle distance rates. Separate rates for appointment and messenger service will also be eliminated under the new schedule, and these services will be offered at person-to-person rates.

Arizona

Preparations for Utilities Association Meeting

A SPECIAL meeting of the board of directors and convention committees of the Arizona Utilities Association was held at Phoenix January 12th, for the purpose of making preparations for the fourth annual convention of the association, scheduled for Tucson April 18th, 19th, and 20th.

The latest plans announced for the convention contemplated a joint meeting with the Pacific Coast Electrical Association and the Pacific Coast Gas Association at a 3-day gathering, the first two days being devoted entirely to business and the third day including a golf tournament, a motor tour, and a dinner dance in Nogales, Sonora. An attractive program was also being arranged for the special entertainment of women attending the convention during this period.

California

A City Increases Rates to Meet Litigation Expense

AN ordinance raising the city water rates 50 per cent for five months in order to secure funds to meet expenses in a suit over the Gibraltar dam was given its first reading at the Santa Barbara city council meeting on December 27th. The increase, it is stated, would be only temporary. The *Santa Barbara Press* reports that an estimated amount of $80,000 to be used in survey and attorney costs in the suit brought by Santa Ynez property owners against the cities of Santa Barbara and Montecito for impounding waters of the Santa Ynez river will be divided by the two defendants. It is believed by councilmen that approximately $9,000 a month will be raised by the increase in water rates.

Higher Water Rates Asked by Company

THE San Joaquin & Kings River Canal & Irrigation Company, it is reported in the *Turlock Tribune*, has applied to the Commission for authority to increase water rates throughout an area of approximately 160,000 acres in Merced, Fresno, and Stanislaus counties. The petition claims that present rates produce approximately $168,000 annually on a valuation of $5,200,000 and asks an increase to produce not less than half a million dollars.

Florida

Hurricanes and Service Charges

THE September hurricane, with other causes, was given by R. W. Reynolds, superintendent of the West Palm Beach Water Company, as the reason for a change in collecting service charges, which began January 1st. The charges hereafter will be in proportion to the size of the meter, customers being placed under two classifications. Collections from permanent customers will be made monthly or quarterly in advance; and from seasonal consumers, the first of the year; or when a meter is installed, for a full twelve-months period in advance instead of for the calendar year as heretofore. Consumers who have had active service continually for twelve months, are automatically classified as permanent. New services will be considered seasonal during the first twelve months, and interruptions of permanent service necessitating the reopening of an account will cause the consumer to be placed on a seasonal basis. It is stated that the unusual burdens imposed on residents by the September hurricane are responsible for making this change.

Illinois

Public Phone Booths Closed in Rate War

DOWN-TOWN hotels in the city of Chicago early this month refused the use of telephone booths to the public as a result of the action of the Illinois Bell Telephone Company in offering new contracts under which the company would take 77½ cents out of every dollar, leaving 22½ cents for the subscriber. The former contract, which has been in effect for thirty years, provided for a guarantee of four calls a day on each telephone. In addition the agreement provided for dividing the

fees over that guarantee equally between the company and the subscriber.

Chicago druggists are also expressing strenuous opposition to the new contract, but it was decided to keep the drug store booths open as a public service, since closing of the booths in residential sections might increase the fire hazard.

William R. Abbott, head of the telephone company, is quoted as stating that the new rate is substantially higher than that allowed owners of telephone booths in other cities.

Judge's Order Changes Chicago Bus Line Situation

JUDGE Otto Kerner on January 2nd reversed the order of the Commission authorizing the Chicago Motor Coach Company to operate busses over a 34-mile route in Northwestern Chicago. The Commission order was resisted by the Chicago Surface Lines and several organizations and individuals. The Commission had given permission for a 10-cent bus service, while the Chicago Surface Lines had sought authority for permission to operate feeder busses in conjunction with its street cars at a 7-cent fare. Judge Kerner reversed the order on the ground that it was made without a hearing of evidence and without notice to some of the interested parties. Attorneys for the motor coach company have indicated that they would appeal from Judge Kerner's order.

Indiana

Rate Reductions under Holding Company Operation

A TOTAL of eleven rate changes effecting savings of $1,295,441 in the aggregate to customers served by the Northern Indiana Public Service Company, was cited by Samuel Insull, Jr., president of the company, in an address at a meeting of stockholders and customers on December 13th, as an effective answer to critics of the public utility industry who claim that holding company control of public utility companies results in increased rates to consumers. He pointed out that the great annual saving to consumers had been brought about since the public utility had become a subsidiary of the Midland Utilities Company.

Meter Installation to Be Investigated

AN investigation has been ordered by the Commission into the practice of the Indianapolis Water Company in requiring the installation of water meters by its customers. The Commission has received many complaints from consumers, who state that the water company refers them to an order passed by the Commission in 1923 urging the company to speed up the work of metering service. The service department of the Commission objects to being "a clearing house of complaints" against the water company's actions in carrying out their meterization program. Revision of the order may result.

Louisiana

Manufacturers Want Lower Rate

THE Manufacturers' Bureau of the Association of Commerce in New Orleans at a meeting on December 21st, decided to continue its fight for pre-war cheap gas and electric rates. The bureau for several years has conducted a campaign for the lower rates, which it claims the New Orleans Public Service, Inc. promised to return to at the close of the war, but which has not yet come about.

Maryland

Commission Files Answer in Car-fare Case

AN answer to the complaint filed by the United Railways in the Circuit Court was filed by the Public Service Commission on December 29th. The traction company had asked that the Commission be restrained from interfering with the company if the latter attempted to charge a straight 10-cent fare. In its answer the Commission takes the position that the decline in the number of passengers and the resulting decrease in revenues to the company have been so much as to indicate that the present rate of fare has reached the full value of the service. It is expected that the United States Supreme Court will finally have to pass upon the question whether the return of 6.26 per cent approved by the Court of Appeals on a former appeal is confiscatory or not.

Massachusetts

Single Fares for Chelsea and Revere Car Riders

SINGLE fares for transportation into Boston from Chelsea and Revere were proposed in a special report of the trustees of the Boston Elevated Railway made public by Governor Fuller on December 28th, although this would entail a loss of $35,000 a year to the Boston Elevated Railway and the Eastern Massachusetts. The Governor stated that he had called for a report from the Elevated trustees on the acquisition of the Chelsea division of the Eastern Massachusetts by the Boston Elevated. Specifically, the Governor asked for the valuation of the Chelsea division as computed both by the Elevated and the Eastern Massachusetts, in order to determine the extent of the "slack" between the two estimates of value.

He stated that this difference would have to be borne by the public or cared for in some other way, but emphasized the necessity of informing the public on all the details relating to the payment of this difference if it were found necessary for the public to pay it. Because of his retirement from office, the Governor's attitude toward the matter was to make the plan public and leave it to the cities involved to carry it out. Plans are also being made for bus lines in order to provide temporary relief for transportation difficulties in Chelsea and Revere.

Chicopee Protests against Power Competition

CHICOPEE city officials and members of the electric light commission and board of trade have sent to President George Hannauer of the B. & M. a protest against the entrance to the local power field of the Holyoke Water Power Company along the right of way of the Boston and Maine Railroad at Willimansett. The officials held that the city light plant representing an investment close to $1,000,000 should not have to face competition by the Holyoke Company, since the city is rendering service to consumers generally and the Turners Falls Power & Electric Company furnishes power in excess of 300-horsepower to industrial consumers.

Purchase of Utility Plant Voted Down

THE Beverly city council on December 26th issued a proposal to purchase the gas and electric plant for municipal purposes. A plan of acquisition was approved last year, but under the law it must be approved by the city council two years in succession before it is submitted to the voters. This action of the council will necessitate starting over again next year if the advocates of municipal ownership wish to go ahead with the project. Their plans have not yet been announced.

New Malden and Melrose Gas Rates Suspended

THE Commission on January 2nd ordered the suspension of the new gas rate schedule of the Malden & Melrose Gas Light Company until February 1st, in order to give the Commission an opportunity to complete its investigation. The Commission on December 19th had held a hearing on the propriety of the new rate schedule. Benjamin N. Johnson, representing the utility company explained that the new schedule of rates was necessary for the company to secure increased revenue, and Albert B. Tenney, president of the company, said the new schedules would give a greater use of gas at a smaller rate. He believed that it would allow consumers wanting to use gas for heating to do so at a cheaper cost. Protests against the new rates were made by J. Sheldon Cartwright, representing the selectman of Winthrop, representatives Thomas F. Carroll and Augustine Aorola of Revere, and city councilman Fred H. Rienstein of Revere. Objections were made to the smaller householders carrying the burden of the gas rates.

Michigan

Uniform Rates Opposed by Northern Counties

OPPOSITION to the application of a uniform rate schedule in 16 northwestern and northern Michigan counties by the Michigan Public Service Company has appeared in proceedings before the Commission. The company is a consolidation of about a dozen different power companies which have been operating independently until recently, and there are 132 political subdivisions of the state involved in the rate controversy, including 21 cities and towns.

According to claims of the utility, the new rate schedules will give about 65 per cent of the consumers a reduction. The uniform rates are temporarily in effect, pending a final decision by the Commission on the question of value and other matters affecting rates.

New Jersey

Legislative Appropriation for Gas Investigation

THE New Jersey legislature has appropriated $25,000 to the Public Utilities Commission for an investigation of the rate changes proposed by the Public Service Electric & Gas Company. Many cities have been opposing the proposed increase in rates, and another hearing will be held by the Commission on February 15th.

Crossing Elimination Expensive

MORE than $250,000,000 will be required to eliminate all the grade crossings in New Jersey, according to an estimate of the budget commission. This estimate is based upon an average cost of $100,000 per crossing. Increased motor traffic, it is stated in the *Newark Star-Eagle,* has made grade crossings one of the biggest problems of the Board of Public Utility Commissioners. Three hundred and four crossings have been eliminated to date, and one hundred and eight additional are either in the course of elimination or are under consideration by the Commissioners. The cost of this work is borne largely by the railroads, although other agencies may share part of the cost by agreement. This has been done in some cases.

New York

New Brief Filed in 7-Cent Fare Suit

A NEW brief in the 7-cent fare case, prepared under the supervision of Charles E. Hughes, was filed on behalf of the Interborough Rapid Transit Company with the United States Supreme Court on January 2nd. A similar brief was filed on behalf of the Manhattan Railway Company, whose elevated lines are operated by the Interborough Company under a lease.

The new brief is only 134 pages long as compared with the 408-page brief submitted in October and rejected by the court as too bulky. The need of a 7-cent fare by the company in order to avoid confiscation is stressed, although, as stated in the brief, the company's success would not mean a 7-cent fare or any other fixed fare in perpetuity, but only such fare or fares as should be reasonable according to changing economic conditions.

The argument of the company is that the Federal Courts have jurisdiction of the case; that the company is entitled to Federal Court protection against confiscation; that it has not contracted away its right to reasonable compensation; that the action of the Commission in enforcing a 5-cent fare was a state action; that the company has complied with all the procedural requirements of the Commission law and its suit in the Federal Courts is not premature; and that the 5-cent fare yields such a low return as to be in practical effect confiscatory.

Hearing on Sub-metering Plan

THE Commission on January 3rd heard arguments on the question of permitting the submetering of electricity to tenants after the current is purchased by the landlord. One of the supporters of the sub-metering plan prophesied that if this practice were not permitted the various buildings would have their own electric power plant, each exuding smoke and ashes into the

windows of the other and menacing the public health, while the electric company would be bereft of its most important customers.

The electric utility, however, is willing to risk the hazards portrayed by the submeterists, according to the *New York World,* and it takes the position that consumers should not be forced to buy, through submeters, current at about $14,000,000 yearly in excess of what the retailers pay to the power company. William L. Ransom, counsel for the New York Edison Company, the Brooklyn Edison Company and others, asserted that if the company could get the difference in money paid to the submetering companies, it would apply the surplus to the reduction of rates to the ultimate benefit of the consumers.

New Utility Holding Company

THE announcement was made on January 10th that a new utility holding company to acquire certain minority interests has been organized by J P. Morgan & Company, Drexel & Company, and Bonbright & Company, Inc. This company, which is to be known as the United Corporation, organized under the laws of Delaware, plans to acquire minority interests in the United Gas Improvement Company, the Public Service Corporation of New Jersey, and the Mohawk Hudson Power Corporation, held by the organizers of the new corporation and by the American Superpower Corporation.

Traction Systems Change Hands

THE purchase of the trolley car and bus lines in Albany, Troy, Cohoes, and Watervliet, and of a half interest in the transportation systems in Schenectady, by Ellis L. Phillips and his associates, has been announced by James F. Hamilton, president of the New York State Railways. Mr. Phillips recently acquired control of the New York State Railways and the Rochester Gas & Electric Corporation, and it is reported that the extension of his traction interests represents an additional investment of approximately $6,000,000. Application has been made to the Commission for authority to merge the systems under the control of a holding company. Mr. Hamilton will be president and will have general supervision of operations.

Electric Rate Reductions on Long Island

THE Long Island Lighting Company has announced the filing with the Commission of new lighting schedules applicable to all yearly consumers to be effective on and after February 17th. These schedules apply both to household and commercial lighting and will cause a yearly reduction to consumers in Suffolk and Nassau counties of approximately $750,000. The company states that this reduction is made possible by the economic operation of the plant and interconnecting transmission system and through using the most modern type of equipment. The attention of the consumers is called to the fact that household appliances and small motors may be placed upon the lighting circuit thereby enabling the consumer to receive the benefits of the lower steps in the new schedules and enabling the company to supply such service through one meter.

New schedules of reduced electric rates for the benefit of a number of communities in southern Queens have also been filed with the Commission by the Queens Borough Gas & Electric Company. These new rates, which will become effective late in February, are expected to reduce the company's annual revenue approximately $175,000 or more.

North Carolina

New Transportation Board Advocated

THE Wilson Chamber of Commerce is seeking legislation creating a state board of transportation consisting of interstate commerce specialists to be appointed by the Governor and the revival of a transportation advisory commission. The Chamber also asks legislation to repeal laws requiring the Corporation Commission to prosecute rate cases before the Interstate Commerce Commission in order that the Commission may devote its whole time and attention to intrastate matters over which it has jurisdiction or control. It is proposed that the transportation advisory commission be given money to furnish it life. The legislature of 1925 created such an advisory commission and charged it with the duty of studying the freight rate structure, but apparently failed to appropriate the money necessary to carry out the purpose of the commission.

Readjustment of Rates in Durham

THE public works committee of the city council, according to a report in the *Durham Herald*, is considering a proposed adjustment in street railway, motor bus, and electric rates in the city. The Durham Public Service Company, it is stated, wishes to reduce electric rates and to increase bus and street car fares. The increased fares would probably fall upon the casual patron and very little, if any, increase would be made in the fares of those purchasing tokens.

The company intends to make such a revision in its electric rate that there will be a reduction in proportion to the amount of current used. The idea is to encourage the use of electric current and to educate the public to employ a larger number of electrical devices in the homes.

Ohio

Opposition to Increase in City Water Rates

INCREASES in water rates ranging from 58 per cent for the average domestic users to 94 per cent for the largest users have been announced by Mayor Joseph L. Heffernan of Youngstown, Ohio, and injunction proceedings have been started by several large users to prevent the collection of the higher rates. The main cause of the increased rates is the Mahoning Valley sanitary district, now under construction, which will furnish Youngstown and Niles with a domestic water supply. It is calculated by city officials that the cost of the district should be allocated 60 per cent to water rates and 40 per cent to general taxes.

Increases are also planned for charitable and semi-charitable institutions, and the schools are to pay for the water they use. Regulations for the use of unmetered water in construction and private fire protection service and rates for water consumers outside the city limits are likewise being considered. It is reported that some of the large consumers are now getting water considerably below the expense of production.

Pennsylvania

Temporary Water Rates Pending Investigation

TEMPORARY rate schedules ordered by the Commission are now in effect in the territory served by the Scranton-Spring Brook Water Service Company pending final determination of the rate litigation before the Commission. These schedules are lower than the schedules proposed by the company but are higher than the rates formerly in effect.

Leaders in the fight for the sixty-eight complainants against the water company state that the opposition to the entire increase will be continued notwithstanding this partial modification of the proposed rate schedules. Users of sprinkler fire protection systems in Lackawanna and Luzerne counties have decided to join the other complainants in opposing increased rates. Increases to sprinkler users are said to vary in amount from 100 to 700 per cent.

It is reported in the *Scranton Sun* that the case of the complainants may finally develop into an effort on the part of their attorneys to set aside reproduction cost as a basis for the finding of rates. The opposition which has been made to the figures in the reproduction cost estimate will, however, continue.

Water Company Charter Assailed

A PROTEST before the Commission was made by Congressman-elect George F. Brumm, of Schuylkill county, against the proposed incorporation of the Norwegian Township Water Company. The Pottsville Water Company made the application for the charter. Mr. Brumm claimed priority charter rights for the township. Counsel for the company expressed a willingness to agree that the Pottsville Water Company would not attempt to extend its mains in the township without Commission authority, if the Norwegian subsidiary were granted a charter.

Philippine Islands

New Electric Company in the Field

THE Tanauan Electric & Development Company, a newly organized corporation, incorporated under the laws of the Philippine Islands, has recently filed an application with the Public Service Commission for the approval of a franchise granted by the municipality of Tanauan, Batangas, to install, operate, and maintain an electric light and power plant in that city, it is reported in the *Manila Bulletin*.

Texas

Telephone Rate Hearings Concluded

THE hearings in the controversy between the city of San Antonio and the Southwestern Bell Telephone Company in regard to rates have been concluded before Joseph B. Dibrell of Seguin, Federal Court Special Master. The company will have until February 10th to present its briefs, and the city must submit its brief on or before March 15th, after which the company will have until April 1st to present its rebuttal briefs. A city ordinance fixing rates is involved.

Virginia

Revision of City Gas Rates

THE city of Richmond is considering a revision of gas rates so that new industries will be induced to locate there. Local business interests using gas from the city plant in large quantities are supporting this move. Director George H. Whitfield has been instructed to prepare a plan for reducing the rates. Figures were presented to the utilities committee of the city council showing that other cities, such as Baltimore and New York, had lower wholesale rates than those prevailing in Richmond. It has been suggested that a general heating rate might be established so that all consumers would benefit.

Telephone Property Acquired by Chicago Concern

THE telephone and telegraph lines of the Northern Neck Telegraph & Telephone Company have been sold to the East Coast Telephones, Inc., a subsidiary of the East Coast Utilities, Inc., according to a statement in the *Richmond News-Leader*. The East Coast Utilities, Inc., now owns the light and power line being constructed in the Northern Neck, with plants at Irvington and Colonial Beach; and with the acquisition of the telephone lines they will be in charge of most all of the public utilities of the Northern Neck. The company has its main office in Chicago and has offices and properties in many sections in Virginia as well as elsewhere.

Suspension of Lexington Telephone Rates

THE Lexington Telephone Company is seeking authority from the Commission to revise its rates by increasing individual business phones 50 cents and residence phones 25 cents. A hearing on the application was held on December 18th, but as the case has not yet been thoroughly investigated by the Commission the proposed schedules have been suspended until February 1st for further study.

Washington

Electric Rate Reductions

A VOLUNTARY reduction in electric lighting and power rates which, according to the Puget Sound Power & Light Company, will save its customers in Lewis, Thurston and Cowlitz counties approximately $29,000 annually was made on January 1st.

The city of Seattle has announced a reduction in rates for users of current outside the city effective January 1st, in order to compete with the rates recently announced by the Puget Sound Power & Light Company. The new rate will be 7 cents a kilowatt hour for the first thirty-five hours consumed each month; 2½ cents a kilowatt hour for the next one hundred and fifteen hours, and 2 cents a kilowatt hour for all over one hundred and fifty hours.

It is announced in the *Seattle Post-Intelligencer* that state representative C. I. Roth will introduce a bill at the coming session of the legislature appropriating funds with which to make a physical valuation of the property of the Puget Sound Power & Light Company, so that the Department of Public Works will have a basis on which to make rates. In the past the firm had always adjusted its rate difficulties and no valuation of the property has been made by the Commission.

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

VOLUME 1929A NUMBER 2

Points of Special Interest

THE *decisions, orders and recommendations of Courts and Commissions, as printed on the pages following, conform to the standard size, proportions and typographical arrangement observed in law reports generally. The pages are numbered, for the purpose of citation, as they will later appear in the bound volumes*

PUBLIC UTILITIES REPORTS, ANNOTATED

CALIFORNIA RAILROAD COMMISSION.

RE SOUTHERN PACIFIC MOTOR TRANSPORT COMPANY.

[Decision No. 20361, Application No. 13775.]

Intercorporate relations — Disregard of corporate existence.

1. It is only when rights of third parties are involved and it is necessary either to prevent fraud, or when the results of so holding will do an injustice, that the corporate existence as a separate entity will be disregarded, p. 197.

Intercorporate relations — Affiliations outside of state — Certificates.

2. A motion by protestants to dismiss an application for a certificate of convenience and necessity on the ground that the applicant corporation was a mere agency of a parent foreign corporation, and should not be recognized as a separate and distinct entity in view of a law prohibiting the issue of such certificate to foreign corporations, was denied, p. 197.

Monopoly and competition — Effect of certificate.

3. Certificates of convenience and necessity are not certificates irrevocably creating a monopoly, p. 198.

Monopoly and competition — Purpose of automobile regulation.

4. The primary purpose of automotive regulation is to secure the adequacy of service and reasonableness of rates, as well as to protect the business of those who are common carriers by controlling competitive conditions, p. 198.

Monopoly and competition — Bus regulation — Highways.

5. The purpose of automotive regulation is in no sense a regulation of the public highways either for protection or conservation, p. 198.

Certificates of convenience and necessity — Reasons for granting.

6. No general principle may be announced which, under all circumstances and conditions, and under every possible set of facts, may measure the rights of every applicant for a certificate of convenience to operate busses upon the state highways, p. 199.

Evidence of necessity — Train discontinuance.

7. The fact that in the past between seventy-five and one hundred thousand passengers per annum had been carried by trains proposed to be abandoned, and that as many, if not more, will thereafter present themselves for transportation, was held to be a sufficient justification for the issuance of a certificate to a subsidiary bus company, p. 200.

Certificates of convenience and necessity — Evidence of necessity.

8. A sufficient showing to justify the issuance of a certificate of convenience and necessity or an application seeking substitution by a railroad company of branch line passenger service with auto transportation on practically paralleling highways was held to have been made where the proposed service was found to be adequate and at reason-

able rates, and satisfactory to the traveling public affected in the way that the proposed service would not increase the competitive situation previously existing between the railroad and existing auto carriers or would merely permit the railroad, either by itself or through its subsidiary, to continue a necessary service without financial loss to any carrier operating in the territory, p. 200.

Certificates of convenience and necessity — Basis for granting — Automobiles.

Statement that the law looks not to the operator, but to the convenience and necessity of the public, and clearly contemplates that applications for certificates shall be granted on that basis alone, and not on the basis of the desires and necessities of the operators, p. 206.

Certificates of convenience and necessity — Substitution of bus for rail service.

Statement that the Commission should apply to a subsidiary bus company seeking to substitute for abandoned rail service, as nearly as it can, precisely the same rules previously applied when stage operators were applying for certificates and rail carriers were protesting, thereby giving preference to any existing stage service able to handle the business, p. 207.

(CARR, W. J., Commissioner, dissents.)

[October 23, 1928.]

APPLICATION by railroad for certificate for motor carrier service; authority to discontinue trains granted and certificate issued for operation of motor carrier route.

Appearances: E. J. Foulds, H. W. Hobbs, and George Smith for applicants; Rittenhouse & Snyder, by Bert B. Snyder, for Coast Dairies & Land Company, Seaside Ranch, Marina Ranch, Davenport Cash Store, Bella Brothers, and others in the general coast section; Sands & Hudson, by R. H. Hudson, for the Chamber of Commerce of Watsonville and Pajaro Valley, and petitioners from southern end of Santa Cruz county; Stanford G. Smith, District Attorney, for county of Santa Cruz; Fred W. Swanton, for the city of Santa Cruz; Warren E. Libby, for protestant Pickwick Stages System; Earl A. Bagley and Warren E. Libby, for protestant Motor Carriers Association; Sanborn & Roehl and DeLancey C. Smith, by Arthur B. Roehl, for protestants Auto Transit Company, Beverly Gibson, and the River Auto Stages; Harry A. Encell and Morgan A. Sanborn, for protestants Coastside Transportation Company, Peerless Stages, Inc., Sierra Transit Company, Sacramento-Reno Stages, and Mount Lassen Transit Company.

Louttit, Commissioner: In this proceeding, the Southern Pacific Company petitions for authorization of this Commission to withdraw from operation the following train service, to wit:

On the Santa Cruz-Watsonville Junction Branch:

From Santa Cruz	*From Watsonville Junction*
Train No. 122	Train No. 121
Train No. 124	Train No. 125
Train No. 126	Train No. 127

On the Santa Cruz-Davenport Branch:

From Santa Cruz	*From Davenport*
Train No. 406	Train No. 401

On the Del Monte Junction, Pacific Grove, Asilomar Branch:

From Del Monte Junction	*From Pacific Grove*
Train No. 210	Train No. 207
Train No. 212	Train No. 209
Train No. 214	Train No. 213

Del Monte Junction to Salinas:

From Del Monte Junction	*From Salinas*
Train No. 30	Train No. 29
Train No. 32	Train No. 31
Train No. 106	Train No. 105

The proceeding also involves an application by the Southern Pacific Motor Transport Company, a California corporation, the capital stock of which (except three shares issued to employees or officers of the Southern Pacific Company for the purpose of qualifying directors) is owned in its entirety by the Southern Pacific Company.

The applicant, Southern Pacific Motor Transport Company, proposes a service and applies for a certificate of convenience and necessity to operate motor coaches for the transportation of passengers and their baggage as follows:

Between Santa Cruz and Watsonville Junction, serving as intermediate points Casino, Seabright, Capitola, Aptos, Watsonville, and Watsonville Junction;

Between Del Monte Junction and Pacific Grove and (when demand exists therefor) to Asilomar, and also all intermediate points now served by the Southern Pacific Company;

Between Del Monte Junction and Salinas and all intermediate points now served by the Southern Pacific Company;

Between Santa Cruz and Davenport and all intermediate points now served by Southern Pacific Company.

The schedules offered in support of the application indicate

that the Southern Pacific Motor Transport Company proposes, upon institution of the service, to adopt time schedules which will take the place of the trains above mentioned and, in some instances, making closer connection than those at present made by the trains. One trip additional from Pacific Grove to Del Monte Junction, and one round trip additional between Santa Cruz and Watsonville Junction is also proposed, and one trip less from Salinas to Del Monte Junction will be operated.

The fares, baggage rules, including free allowance, excess baggage charges, etc., are, with one or two minor exceptions relating to fares, the same as the fares, baggage rules, and regulations of the Southern Pacific Company. It also proposes to honor all forms of Southern Pacific tickets, including one-way, round-trip, and commutation tickets.

The application of the Southern Pacific Company to abandon train service, as well as the application of the Southern Pacific Motor Transport Company for a certificate of convenience and necessity to operate motor coaches for the carrying of passengers, is protested by the Pickwick Stages System, the Motor Carriers Association, the Motor Transit Company, Auto Transit Company, Beverly Gibson, River Auto Stages, Coast Side Transportation Company, Peerless Stages, Sierra Transit Company, Sacramento-Reno Stages, and Mt. Lassen Transit Company.

All protestants join in the general objection to the proposed service on the ground that the railroad company should not, either directly or through its subsidiary the Southern Pacific Motor Transport Company, be permitted to operate busses over the highways for the transportation of passengers and their baggage; that a monopoly of this form of transportation should be preserved to the auto bus transportation companies because they have developed the business, and, as expressed by them, "It is our business and should be preserved to us;" and, further, that the railroad lines should be "compelled to stick to the rails."

The Auto Transit Company serves the same general territory proposed to be served by the Southern Pacific Motor Transport Company (except the proposed Santa Cruz-Davenport service). It further protests the granting of any certificate to the applicant, Southern Pacific Motor Transport Company, upon the grounds

(1) that applicant has made no affirmative showing of public convenience and necessity for the proposed service; (2) that it has made no showing that the service may be profitably operated; (3) that the cases in which the Commission has heretofore authorized railroad lines to operate busses differ from the instant case; and, (4) that the Auto Transit Company is now operating in this territory an adequate service at reasonable rates and that, for that reason, no new service is necessary. The Auto Transit Company also offers to contract with the Southern Pacific Company on the same terms as is proposed by the contracts introduced in evidence between the Southern Pacific Company and the Southern Pacific Motor Transport Company.

The Coastside Transportation Company interposes similar objections on its behalf to the granting of a certificate to the Southern Pacific Motor Transport Company authorizing the Santa Cruz-Davenport service.

The Southern Pacific Company is a corporation chartered under the laws of the state of Kentucky.

[1, 2] The protestants, during the course of the proceeding, moved dismissal of the proceeding upon the ground that the Southern Pacific Motor Transport Company was not authorized, under the laws of the state of California, to receive from this Commission a certificate of convenience and necessity authorizing it to operate motor busses for the carrying of passengers for hire. In support of this motion, it is contended that, as the capital stock of the Southern Pacific Motor Transport Company is owned in its entirety by the Southern Pacific Company, a foreign corporation, the Southern Pacific Motor Transport Company is, in fact, a mere agency of the Southern Pacific Company, a foreign corporation, and should not be recognized as a separate and distinct entity by this Commission, and that any certificate issued to the Southern Pacific Motor Transport Company would be, in effect, a certificate issued to the Southern Pacific Company, a foreign corporation, to which, under the provisions of the Public Utilities Act, the Commission is not empowered to issue a certificate of convenience and necessity authorizing the performance of the public utility service herein sought.

The general rule is that a corporation, duly organized and

existing, is an entity, separate and distinct from its stockholders, with separate and distinct liabilities, obligations, rights and powers, and should be recognized as such. Wenban Estate v. Hewlett, 193 Cal. 675, 697, 227 Pac. 723.

It is only when rights of third persons are involved and it is necessary either to prevent fraud or when the results of so holding will do an injustice that the courts will disregard the corporate existence as a separate entity.

In the proceeding pending, it is the Southern Pacific Motor Transport Company, a domestic corporation, which makes the application and it is entitled, if authorized by the Commission, to operate as a public utility in this state. No fraud is committed by recognizing the Southern Pacific Motor Transport Company as an entity, separate and distinct from the owner of its capital stock, neither does such recognition, in the instant case, result in any injustice to any party to this proceeding.

The motion of the protestants to dismiss should be denied.

[3–5] The protestants further contend that highway transportation has been developed by the present bus operators and is their business, and that they should be protected in it by refusal of certificates to railroad companies, or their subsidiaries, even though the effect of the issuance of a certificate to such an applicant may be only the preservation to the railroad company of its present business. To such a doctrine I am unable to subscribe. Certificates of convenience and necessity, issued by the Commission, are not certificates irrevocably creating a monopoly. So well has this become established with this Commission that in the issuance of certificates of convenience and necessity, and by the very terms of the certificates themselves, grantees are notified that certificates of convenience and necessity for the operation of motor busses create a purely permissive monopoly of "a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state, which is not in any respect limited to the number of rights which may be given."

It is urged that the granting of a certificate to the Southern Pacific Motor Transport Company will result in the operation on the highways of an additional line of busses and for this rea-

son the application should be denied. This contention involves the policing of the highways. The question of the purposes of the Auto Truck and Transportation Act, which has now been, so far as passenger transportation is concerned, included in the Public Utilities Act, received the consideration of the supreme court of the state of California in the cases of Frost v. Railroad Commission, 197 Cal. 230, P.U.R.1926B, 218, 240 Pac. 26; Franchise Motor Freight Asso. v. Seavey, 196 Cal. 77, P.U.R. 1926A, 630, 235 Pac. 1000.

In each of these cases the contention was made that the purpose of the act was the policing of the highways, but the court held that the primary purpose of regulation is to secure the adequacy, regularity, and reliability of service and reasonableness of rates and charges therefor and that the act is in no sense a regulation of the use of public highways. It is a regulation of the business of those who are engaged in the use of them and its primary purpose is to protect the business of those who are common carriers by controlling competitive conditions. Protection or conservation of the highways is not involved.

[6] No general principle may be announced which, under all conditions and circumstances and under every possible set of facts, may measure the rights of every applicant for a certificate of convenience to operate busses upon the highways. Each case must be determined by the facts presented for consideration; yet, when it appears that there is a material number of the public to be served; that the service, so far as applicant is concerned, will be a compensatory one or has a reasonable assurance of becoming so; that there are people in great number desirous of and who will patronize the service; that the service will better serve the public than that offered by any other carrier then in the field; and, that the proposed service will not result in injury to any existing utility then operating, a certificate should issue even though as a result there will be added to the lines already operating on the highways another line of busses.

The evidence offered in support of the application of the Southern Pacific Company shows that the revenues derived from the operation of the trains sought to be abandoned are considerably less than the cost of operating the trains and that authority

to abandon the trains should be granted provided an adequate substitute, which can be economically justified, is offered.

[7] The evidence further shows that, during the month of August, 1927, the trains to be discontinued severally carried passengers as follows: [Table omitted].

From the foregoing tabulation it becomes quite apparent that there is a considerable number of passengers who have heretofore presented themselves to the Southern Pacific Company for transportation and who have been transported between the points involved in the application. It is conceded that August is not a typical month and it is probably true that the number of passengers carried during the month of August is more than one-twelfth of the total passengers annually transported between the points involved. If we assume, however, that 75 per cent of twelve times the number of passengers carried during the month of August represents the passengers who now present themselves for transportation and will present themselves in the future, there will be passengers in sufficient number available for transportation to justify substituted service for the trains sought to be discontinued. To my mind there is no question as to the absolute necessity of a substituted service in the event the Southern Pacific Company is permitted to cease operation of the trains involved in this application. It is safe to estimate that in the past between seventy-five and one hundred thousand passengers per annum have been carried by the trains involved and that as many, if not more in number, will hereafter present themselves for transportation. This circumstance alone is sufficient justification for the issuance of a certificate of convenience and necessity for the performance of the service applied for.

[8] Many witnesses were called from Watsonville, Santa Cruz, Pacific Grove, Monterey, and Salinas, all of whom testified that they believed the service proposed by the Southern Pacific Motor Transport Company was a necessary service and that they would patronize that service in preference to a similar service to be performed by any existing motor coach carrier now serving in the respective territories above mentioned.

It is urged that the proposed service of the Southern Pacific Motor Transport Company should be denied for the additional

reason that the service proposed will not be a compensatory one to the Southern Pacific Motor Transport Company. It is shown that in the month of August, 1927, there were carried on the trains, the discontinuance of which are sought, 9941 passengers and that the total revenues realized therefrom were $3,872. According to the exhibits of the protestants in this case, if this service had been performed by the Southern Pacific Motor Transport Company and it received for the performance compensation according to its proposed tariffs, the gross annual revenue would have been a minimum of $65,000, or a maximum of $72,200. The estimated cost to the Southern Pacific Motor Transport Company of the proposed service is estimated at $61,358 minimum, or a maximum of $67,650. It appears, therefore, that the bus company, though the estimated revenue is small, will earn something over and above its operating expenses. Such a showing, particularly where it is apparent from the record that the new service to be instituted is in a rapidly growing community and the probabilities are that revenues realized from the increased traffic will, in a reasonable time, result in profit to the utility, is sufficient to justify the granting of a certificate so far as the financial results are concerned.

It is contended by the Auto Transit Company that it is now in the field with ample facilities for the performance of any service necessary to be performed in transporting these passengers and that, therefore, no certificate should be issued to the Southern Pacific Motor Transport Company.

The record, however, discloses that the protestants are not in position at the present time to perform all of the proposed service absolutely necessary and essential as a substitution for the train service, discontinuance of which is herein authorized.

The protestants call to our attention many cases in which the Commission has held that, where a territory is amply supplied with adequate service at reasonable rates, competition will not be permitted. I have no quarrel with this doctrine but deem it inapplicable here for the reason that here we have two carriers, both of whom have dedicated property to public use for a transportation service and both of whom have been in the field for many years in the past, each, so far as the record is concerned, serving

practically the same communities and each in its own field performing a reasonable, adequate, satisfactory service at reasonable rates. The railroad company now desires, because some of the property which it now operates in the service no longer returns to it any remuneration, to withdraw that property and, through its subsidiary, perform an identical service by dedication of other facilities to the performance of that service.

Where the situation developed before this Commission in an application seeking substitution by a railroad company of branch line passenger service with auto transportation on practically paralleling highways discloses that there is no carrier operating in the same general territory performing the identical service applied for; that the service, as proposed by the applicant will be adequate, satisfactory, and at reasonable rates; that the residents in the community are desirous of and will patronize the proposed service; that the rates proposed will make the operation a self-sustaining one; that the service, as it is proposed to be rendered, will not in any way increase the competitive situation theretofore existing between the railroad company and auto carriers then operating in the same general territory, and that the results of such proposed service will be merely to permit the railroad company, either by itself or through its subsidiary, to continue to perform a necessary service without financial loss to any carrier operating in the territory, a sufficient showing has been made to justify the issuance of a certificate of convenience and necessity. The applicant in this proceeding has fully met these requirements and I recommend that a certificate be granted.

Southern Pacific Motor Transport Company is hereby placed upon notice that "operative rights" do not constitute a class of property which should be capitalized or used as an element of value in determining reasonable rates. Aside from their purely permissive aspect, they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state, which is not in any respect limited to the number of rights which may be given.

Carr, Commissioner, dissenting: The result expressed in the

order, under the record, might well be reached without a departure from clearly established policies of the Commission.[1] Indeed, if certification were granted upon the finding contained in the majority opinion that the existing stage lines were "not in a position at the present time to perform all of the proposed service absolutely necessary and essential as a substitution for the train service, discontinuance of which is herein authorized" I could assent to the order as one in harmony with previous decisions of this body.

The order, however, when read with the opinion which precedes it, lays down a general policy to govern substitution of rail service by stage service which, in my opinion, represents a departure from previous policies of this Commission.

The new policy laid down is expressed as follows in the opinion, the numbering being inserted for convenience:

Where the situation developed before this Commission in an application seeking substitution by a railroad company of branch line passenger service with auto transportation on practically paralleling highways discloses (1) that there is no carrier operating in the same general territory performing the identical service applied for; (2) that the service, as proposed by the applicant will be adequate, satisfactory and at reasonable rates; (3) that the residents in the community are desirous of and will patronize the proposed service; (4) that the rates proposed will make the operation a self-sustaining one; (5) that the service, as it is proposed to be rendered, will not in any way increase the competitive

[1] The evidence justifies the withdrawal of the train service as proposed by the Southern Pacific Company. As to the main routes for which stage certification is sought, the evidence fully justifies a finding that the stage service existing at the time the application was filed did not measure up to the high character of service to which the Monterey peninsula, under all the circumstances, was justly entitled. With such a finding certification would logically follow. In respect to the Santa Cruz-Davenport route, the train proposed to be taken off almost exclusively serves night shift workers at the cement plant at Davenport. These are cared for at present under commutation rates which seem to be reasonably adapted to this character of business. The existing stage carrier does not run schedules at night and was unwilling to undertake the transportation of these workers on present commutation rates. Public convenience and necessity under these circumstances would clearly call for certification of a stage operation which would accommodate these passengers at reasonable commutation fares.
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situation theretofore existing between the railroad company and auto carriers then operating in the same general territory, and (6) that the result of such proposed service will be merely to permit the railroad company, either by itself or through its subsidiary, to continue to perform a necessary service without financial loss to any carrier operating in the territory, a sufficient showing has been made to justify the issuance of a certificate of convenience and necessity.

Under this pronouncement, authorization for the substitution by the rail carriers of rail transportation by stage transportation will be a mere matter of routine and presumably the requested authority will be granted by *ex parte* order, as no real need will exist for a public hearing.[2]

In this class of applications three interests are involved. The railroad company desires to reduce its loss from unprofitable train operation by substituting stages and to hold what it terms its own business, even though in itself unprofitable.[3] The existing stage company naturally wishes to avoid the competition certain to result from a new stage line and desires to augment its business by the business handled by the trains proposed to be withdrawn. The third interest is that of the public, and the real question is whether the convenience and necessity of the public

[2] The only specifications which would occasion a public hearing are ones which are unsound and will doubtless soon disappear. Specification (4), for instance, that the rates proposed will make the operation a self-sustaining one, is not sound. If substitution should be allowed and if it is less expensive than the existing rail service, it should not be necessary that the operation be a self-sustaining one. Specifications (5) and (6) are equally unsound. If there is public necessity for the service, the fact that it increases "the competitive situation" would be no ground for denying it. In few, if any, applications would it appear that any carrier is performing "the identical service applied for." Existing stage lines are not performing a station-to-station service even though serving the very same communities in which the stations are located. If the proposed service is a substitution at prevailing rail rates, the Commission could hardly conclude otherwise than that it will "be adequate, satisfactory, and at reasonable rates." Existence of patronage for rail transportation proposed to be discontinued would in itself lead to the conclusion that there would be patronage of the new service.

[3] If the proposed new operation would in itself be a profitable one it would in most cases appear that traffic was sufficient to justify and require more than one stage line.

require the certification of additional stage service on the highways.

Prior to 1917 there was no restriction on the use of the highways for public motor transportation except for local permits, but in that year the legislature, by enacting the Auto Stage and Truck Transportation Act, established a new policy, namely, that no new use of the highways for motor transportation between fixed termini should be had unless the public convenience and necessity so required, committing to the Railroad Commission the determination of whether such public convenience and necessity existed. In 1919 this act was amended by withdrawing the requirement which appeared in the original act that local permits must be secured before the Commission could certificate an applicant. Thereafter the granting of a certificate by the Railroad Commission has been accepted as carrying with it the right to use the highways for the transportation authorized—at least in the absence of local regulations requiring permits. Certificated carriers are commonly spoken of as "franchise carriers."

I am not unmindful of the decisions of the state supreme court, *supra,* referred to in the majority opinion emphasizing that the primary purpose of the act was to secure the adequacy, regularity, and reliability of service rather than to regulate the use of the highways. I do not read these decisions as holding that it was not a purpose of the legislature to control the use of the highways.[4] I am unable to see how the court could so hold in view of the fact

[4] While the supreme court in Frost v. Railroad Commission, 197 Cal. 230, P.U.R.1926B, 218, 240 Pac. 26, held the legislation not to be "a regulation of the use of the highways," it is significant that the decision was grounded upon the theory that certification was a special privilege to which conditions might be attached, and in the opinion appear many references to the right to use the highways for a private business as a special privilege. Thus it is said "by the Auto Stage and Truck Transportation Act the state offers the special privilege of using the public highways for the transaction of a private business, a privilege to which no one is entitled as of right." While the act may not be in a strict sense a regulation of the "use of the highways" it does, in fact, in its certification feature provide a scheme for determining who may and may not use them. In effect the certification of a carrier is the extending to that carrier of a right in the nature of special permit or franchise or, as expressed by the supreme court, "a special privilege" without which the use of the highways for this private business is unlawful.

that certification is in effect the grant of a permit or franchise to use the highways. A study of the legislative history of acts dealing with motor transportation leads me to the conclusion that what the legislature had in mind was to secure adequate transportation with the least possible congestion of the public highways.[5] The effect of certification of a new stage line on congestion of the highways is an element which is entitled to some consideration.

Immediately upon the enactment of the legislation of 1917 there commenced a bitter struggle over the application of the certification feature of the law. This necessarily brought to the front its meaning and scope. Requests for new stage lines were almost invariably vigorously contested by rail carriers. Rather quickly the Commission attached a definite meaning to the certification requirement and has with great uniformity adhered to the construction thus adopted. The leading decision of the Commission is Re Santa Clara Valley Auto Line, 14 Cal. R. C. R. 112 (anno.) P.U.R.1918C, 319, in which the opinion was written by Messrs. Thelen and Gordon, Commissioners, and concurred in by the remaining members of the Commission. There it was said:

Accordingly, when application is made to the Railroad Commission for an order authorizing automobile stages to operate, the sole test which the Railroad Commission may apply is whether or not the convenience and necessity of the public require that the service as contemplated by petitioner shall be rendered. This is not a question as to whether the public authorities shall extend a favor to existing operators by refusing to permit newcomers to enter the field or whether they shall extend a favor to the newcomer by permitting him to compete with existing companies. No person has a vested right to engage in a public utility service. *The law looks not to the operator but to the convenience and necessity of the public and clearly contemplates that applications*

[5] The writer of this opinion was a member of the legislature at the time and took a somewhat active part in the enactment of this legislation. Some control over the indiscriminate and uncontrolled use of the highways for public transportation was undoubtedly one of the objects the legislature had in view.

of this character shall be decided on the basis of this test alone and not on the basis of the desires or necessities of the operators. Operators may be permitted to enter the field only at such times and in such places and under such conditions as will best subserve the convenience and necessity of the public. (Italics ours.)

This decision has been frequently cited with approval and, in terms at least, has never been departed from, although a reading of some of the decisions of this body indicate that possibly more attention has been paid to conflicting equities between applicant and protestant than to the basic question of the interest and necessity of the public.

As I read the decisions and orders of this Commission, it has never certificated a new stage line without a holding, expressed or implied, that existing transportation facilities were absent or inadequate. The rule laid down in the majority opinion dispenses with the necessity for any such finding.

The meaning attached by the Commission over a period of years to the expression "public convenience and necessity" becomes especially important in view of the fact that the legislature in 1927 saw fit to amend the Public Utilities Act so as to place auto stages under that act instead of under the Auto Stage and Truck Transportation Act of 1917. In making this change it employed the identical language of the earlier act respecting certification, language which had been given a definite meaning by repeated orders and decisions of the Commission. It is a well-settled rule of statutory construction that when the legislature passes an act, using language which has already been given judicial construction, it is deemed to have used the language with that meaning attached to it. Whether this rule applies to the case of construction placed upon the adopted language by an administrative body like the Railroad Commission, charged with the administration of the act from which the language is taken, it is unnecessary to decide because it is clear that this Commission should not now change its long established policy upon a reversal of position taking place as between the parties.

If this whole matter of stage transportation were new there would be most convincing arguments in favor of allowing the ordinary forces of competition free run. But it is not that. The

legislature has laid down a general policy of certification. It applies to the use of the highways for stage transportation whether conducted by an independent stage operator or by a railroad and this Commission should apply to the applicant here, as nearly as it can, precisely the same rules it has heretofore applied, when, as it happened, the stage operators were applying for certification and rail carriers were protesting.[6]

Clearly, if stage transportation existing at the time the proposed substitution is sought does not measure up to a high degree of adequacy, substitution should be authorized and a new stage service certificated. If, however, there is an existing stage service that is adequate, it seems to me that at least an attempt should be made to fit this into the transportation system of the state and make it fill its greatest measure of usefulness. After all, the public is not particularly interested in this railroad or that stage operator. What the public wants, needs, and is entitled to is good transportation. If this can be served by one stage line occupying the public highways the public is better served than if there are two or three or four stage lines congesting the roads. If the stage line refuses or fails to properly co-ordinate its facilities with the rail facilities and seeks to gain a competitive or other advantage, it could well be held that the existing service does not measure up to the standard of adequacy the public is entitled to and the rail carrier be permitted to put on its own stage line.

With such a general formula or policy in effect this Commis-

[6] There is nothing in the legislation dealing with certification which suggests that the legislative intent was that railroads when desiring to go into the stage business should receive any other or different treatment than that accorded an independent stage operator. There is strong evidence to the contrary. Although it is a matter of common knowledge that the principal rail carriers are foreign corporations, the legislature in 1927 amended § 5 of the Auto Stage and Truck Transportation Act so as to provide that no certificate should be granted to a foreign corporation. In 1927 the definition of "street railway corporation" in the Public Utilities Act was amended so as to include bus operations. If the legislature had intended that railroads should be extended special treatment in the matter of stage operations, it is most strange that in 1927 it forbade certification to foreign corporations (the Public Utilities Act under which passenger stage operations were placed in 1927 had a similar provision) and in 1927 legislated specially for street railways respecting stage operations but not for the steam roads.
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sion would be fully consistent with its prior decisions. If the policy as expressed in those decisions is wrong, it should be changed by the legislature by legislating specifically respecting the substitution of stage for rail transportation by the rail carriers.

UNITED STATES SUPREME COURT.

LEHIGH VALLEY RAILROAD COMPANY

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS et al.

[Nos. 24, 54.]

(— U. S. —, 73 L. ed. —, — Sup. Ct. Rep. —).

Crossings — Jurisdiction of court.

1. The function of the Court on appeal of a Commission order requiring a separation of grades is to determine whether the outlay involved in the order of the Board is extravagant in the light of all circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement, the prospect of enlarged capacity for future requirements, and other relevant considerations, but it is not for the Court to cut down expenditures ordered by the Board merely because more economical ways suggest themselves, p. 214.

Crossings — Commission jurisdiction — Grade separation.

2. The Board has the discretion to fix the cost of the grade separation, p. 214.

Constitutional law — Police powers — Grade crossing elimination.

3. The state has a constitutional right to insist that highway crossings shall not be dangerous to the public, and where reasonable public safety requires abolition of grade crossings, the railroad can not prevent the exercise of police power on the ground of interference with interstate commerce or danger of bankruptcy to the railroad, p. 214.

Crossings — Court jurisdiction on appeal — Reasonable expense of grade separation.

4. It becomes the duty of the Court upon appeal where the cost of a grade crossing elimination is questioned, to determine whether such expense is within reasonable limits, p. 214.

Crossings — Interstate Commerce Commission — Transportation Act.

5. It was not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into such parochial matters as the reasonableness of the cost of grade separation, unless by reason of their effect on economical management and service of interstate carriers, their general bearing is clear, p 216.

Constitutional law — Provisions for appeal from Commission order — Due process.

6. A state statute providing that any order made by the Board may be reviewed upon certiorari after notice and giving to the state supreme court jurisdiction to review the order and set it aside where no evidence appears to support reasonably the Board's order, or where the Board acted without jurisdiction and providing for rehearing before the Board in just and equitable cases, is sufficient provision for appeal and review to meet the Federal Constitutional guarantee of due process, p. 216.

[November 19, 1928.]

APPEALS from orders of a statutory three judge Federal District Court denying to a railroad company an injunction sought to restrain enforcement of an order of the New Jersey Board of Public Utility Commissioners; lower court affirmed.

Appearances: Duane A. Minard and George S. Hobart for appellant; John O. Bigelow for appellees.

Mr. Chief Justice **Taft** delivered the opinion of the court:

These are two appeals from orders of a circuit judge and two district judges of the United States sitting in the district court of New Jersey, denying to the Lehigh Valley Railroad Company injunction sought by it in that court under § 380, U. S. Code, title 28 (§ 266 of the Judicial Code). The defendants were the Board of Public Utility Commissioners, the Attorney General, and Francis L. Bergen, prosecutor of the pleas of Somerset county, all of New Jersey. The order sought to be enjoined was one made by the Board of Public Utility Commissioners requiring the railroad company to eliminate two railroad grade crossings in Hillsborough township, Somerset county, New Jersey, and to substitute for both of them one overhead crossing, to cost the railroad company $324,000. It was alleged that the change would involve unreasonable expenditure and thereby violate ¶ 2, § 15, of the act of Congress to regulate commerce, as amended by the Transportation Act of [February 28] 1920 [41 Stat. at L. 488, chap. 91, U. S. Code, title 49, § 15a], by interposing a direct interference with interstate commerce and imposing a direct burden thereon; that it would confiscate the property of the railroad company, deny it the equal protection of the laws and impair the obligation of a contract between the company and the State Highway Commission. The three Federal judges heard

the application for a temporary injunction and denied it, and on final hearing entered a degree dismissing the bills.

The state highway involved is route No. 16, and crosses the Lehigh Valley Railroad in a direction northeasterly and southwesterly, at an angle of 29 degrees, with approaches on either side at the grade of 5 per cent for a distance of 125 feet from the tracks. The right of way of the railroad company at this crossing is 100 feet wide and is occupied by four main operating tracks and various railroad appurtenances. Two hundred and thirty feet east of the center line of the crossing is a station on the west-bound side of the railroad known as "Royce valley."

At a point 1400 feet easterly, there is another grade crossing on what is called the Camp Lane road, branching off from the highway in a southeasterly direction across the railroad at a practically level grade. The order of the Board would eliminate this crossing also.

In December, 1922, negotiations were opened between the railroad company and the State Highway Commission for the purpose of considering a plan for these eliminations. The negotiations continued until March 11, 1924, when the State Highway Commission adopted a resolution approving the plan of their engineer. There was public objection to it, and the negotiations continued, until finally the engineering staff of both the company and the Highway Commission agreed on plan C, to cost $109,000. The Highway Commission expended some $5,000 in preliminary preparation for its execution.

No contract was ever signed, either by the railroad or the Commission. The Highway Commission had statutory power to make such a contract, but none was made other than the informal agreement between the engineering staffs.

The matter was then taken up in 1926 by the Board of Public Utility Commissioners, which was vested with authority to order railroad companies to eliminate grade crossings and to direct how they should be constructed. On November 24, the Board of Public Utilities issued an order to the railroad company providing for a different plan from that considered by the Highway Commission, to cost $324,000.

The railroad company sought to restrain the enforcement of

this order by application for certiorari to a judge of the supreme court of New Jersey. He heard the preliminary application and an argument on the subject, together with evidence in the form of affidavits on the issue made, denied the application for a restraining order, and ordered the certiorari presented before the full supreme court en banc. The application was there presented on briefs and was denied.

A preliminary question is whether there was a contract made between the railroad company and the Board of Highway Commission, so that the order by the Board of Public Utility Commissioners would be an impairment of it and a violation of the Federal Constitution. There was certainly no legal contract completed between the Highway Commission and the railroad company. Plans were only tentatively agreed upon. The expenditure of $5,000 in anticipation of the execution of the contract to move some tracks did not constitute an estoppel equivalent to making it or agreeing to it.

It is objected by the railroad company that the expense of the crossing of $324,000 is unreasonable, when it might have been constructed by an expenditure of at least $100,000 less.

The state of New Jersey, lying between New York and Philadelphia and the West, has always been a thoroughfare for intrastate and interstate commerce. The state has issued bonds to the extent of $70,000,000 for the improvements of its roads, and they now aggregate 1,500 miles in length. The highway with which we are concerned is known as route 16, and is one of the chief arteries of travel between Central New Jersey and the lake and mountain regions of the northern part of the state, Northeastern Pennsylvania and the lower counties of New York. In connection with two other highway routes, it has become one of the principal roads between New York and Philadelphia. The traffic diagonally across the state is so heavy and so constantly growing that no one road can carry it all. So another route, No. 29, was authorized by the legislature in 1927, and when it is completed, the traffic at Royce valley crossing, already heavy, will be much increased. The highway here in question was an ancient county road laid out in 1811. It has always been

a road at this point running straight 2,000 feet north of the railroad and 2,500 feet south of it.

Two plans for elimination of the two crossings were finally presented, one by the chief engineer of the Board of Public Utility Commissioners, and one called "plan C" by the railroad company. The plan of the Board provided for keeping the highway straight, carrying it under a bridge of the railroad tracks with a width of 66 feet, elevating the tracks for clearance, and dividing the highway by a central pier of 5 feet, two roadways of 20 feet each, and two sidewalks of 10 feet 6 inches each.

Plan C provided for the vacation and abandonment of the highway where it crosses the railroad right of way, so that route 16 would come to a dead end both north and south of the railroad. It provides further for the laying out and establishing of a new stretch of highway which would cross the railroad about four hundred feet east of the present crossing. It would first have a 6-degree curve to the east. It would then have a straight course of about two hundred and fifty feet to the entrance of the tunnel under the railroad tracks. A short distance beyond the tunnel a second 6-degree curve to the west would begin, and then a third 6-degree curve to the east and the roadway would join route 16 at a point about one thousand feet south of the intersection of the route with a center line of the railroad. It would thus have three 6-degree curves in it in about half a mile, with cuts, which at stations 100 feet apart would have 7 feet of depth at one, 10 feet of depth at another, $7\frac{1}{2}$ feet of depth at a third, and 5 feet at a fourth.

Plan C provided for two roadways, each 18 feet wide, and a center pier 5 feet wide, making a total width of 41 feet, and would create an angle of divergence of 54 degrees. It would make the tunnel under the railroad, measured along the center pier, about seventy-five feet long, as against 105 feet by the Board plan. The original cost as proposed by the railroad plan was $109,000, but by including the Camp Lane elimination, and two sidewalks on the roadway in the tunnel, both of which were plainly needed, and the increase in the width of the tunnel roadways, the cost was increased to $205,000, and to these additions and others the company ultimately acceded.

The chief increases in the cost of the board plan over plan C, as modified, are in the requirement that the highway shall remain straight, and in the circumstance that under the Board plan the bridge of the railroad tracks must be raised to secure sufficient clearance for the use of the straight highway beneath. The tunnel and the bridge over it, if straight, must be 105 feet long, while under the railroad plan, with the three curves, and the cuts below the surface, the bridge would be only 75 feet, or shorter by one-third.

[1, 2] The witnesses for the railroad testify that 6-degree curves are not dangerous, and that the additional cost of $100,000 for preserving the straight road is not within the limit of reasonableness. The advantage of straightness in such a road through a tunnel is clear. The curves in the cuts of from 5 to 10 feet in the railroad plan would tend to increase the embarrassment of driving and to obscure the clearness with which the drivers can see those ahead in and through the tunnel and the curves. This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadways most desirable. The large expenditure to secure such advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.

It is not for the Court to cut down such expenditures merely because more economical ways suggest themselves. The Board has the discretion to fix the cost. The function of the Court is to determine whether the outlay involved in the order of the Board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant.

[3, 4] An increase from $200,000 to $300,000 for a railroad crossing might well, under different circumstances from those here, be regarded as so unreasonable as to make the order a violation of the company's constitutional rights and to be in the nature of confiscation. The protection of the 14th Amendment in such cases is real, and is not to be lightly regarded. A rail-

road company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This Court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. Erie R. Co. v. Public Utility Comrs. 254 U. S. 394, 65 L. ed. 322, P.U.R. 1921C, 143, 41 Sup. Ct. Rep. 169. This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.

This follows from principles clearly established by this court. Missouri, K. & T. R. Co. v. Oklahoma, 271 U. S. 303, 70 L. ed. 957, P.U.R.1926E, 268, 46 Sup. Ct. Rep. 517; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 129, 131, 59 L. ed. 157, 161, 162, 35 Sup. Ct. Rep. 82; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Norfolk & W. R. Co. v. Public Service Commission, 265 U. S. 70, 74, 68 L. ed. 904, 907, P.U.R.1924D, 709, 44 Sup. Ct. Rep. 439; Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 390, 391, 61 L. ed. 1216, 1219, P.U.R.1917E, 791, 37 Sup. Ct. Rep. 602; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18. We emphasize this not because there is doubt about it, but because we deprecate the impression, apparently entertained by some, that in the safeguarding of railroad crossings by order of state or local authority the exercise of police power escapes the ordinary constitutional limitation of reasonableness of cost. This is apt to give to local boards a sense of freedom which

tempts to arbitrariness and extravagance. The case before us is one which is near the line of reasonableness, but for the reasons given we think it does not go beyond the line.

An elaborate argument is made by counsel for the railroad company to impeach the validity of the order of the Board of Public Utilities in this case because of the amendment to the Interstate Commerce Law contained in the Transportation Act of 1920, § 15–a, ¶ 314, § 416. Based on this, it is said that the Board has no right to order these unreasonable expenditures for construction because they exceed the legal duties of the carrier and the reasonable requirements of public safety and convenience. It is not necessary for us to controvert the proposition that unreasonably extravagant grade crossings are to be enjoined not only as violations of the 14th Amendment but also as forbidden by the Transportation Act.

[5] But we can not see that the rule invoked from either will be violated by the order now made. The care of grade crossings is peculiarly within the police power of the states. (Railroad Commission v. Southern P. Co. 264 U. S. 331, 341, 68 L. ed. 713, 716, P.U.R.1924D, 246, 44 Sup. Ct. Rep. 376), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear. Railroad Commission v. Southern P. Co. *supra*. The latter case makes a distinction between the local character of the usual elimination of grade crossings and the vital character from the standpoint of finance of the investment of large sums in the erection of a union station.

[6] The final objection to the order is that the statute providing for the elimination of grade crossings by the Board of Public Utilities impinges on the constitutional rights of the company, because it makes no provision for appeal from the decision of the Board of Public Utilities to a court with jurisdiction judicially to determine independently on the law and facts whether

the property of the company is being confiscated in violation of the 14th Amendment to the Federal Constitution. Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 64 L. ed. 908, P.U.R. 1920E, 814, 40 Sup. Ct. Rep. 527. In that case the Public Service Commission of Pennsylvania instituted an investigation and took evidence upon a complaint charging a water company with demanding unreasonable rates. The Commission fixed the valuation of the company's property and established rates on that basis. The company contended that the valuation upon which the income was calculated was much too low and deprived it of a reasonable return and, therefore, confiscated its property. On appeal to the superior court, that court reviewed the certified record, appraised the property, reversed the order and remanded the proceedings with directions to authorize rates sufficient to yield 7 per centum of the sum. The supreme court reversed the decree, saying that there was competent evidence tending to sustain the Commission's conclusion, and as no abuse of discretion appeared, the superior court could not under the Pennsylvania statute interfere. This court held on error that because the plaintiff in error had not had proper opportunity for an adequate independent judicial hearing as to confiscation on the law and the facts, the challenged order was invalid, and that the judgment of the supreme court of the state must be reversed.

We do not think the Ben Avon Case, *supra,* applies here. In this case Chap. 195 of the Laws of 1911 of New Jersey created a Board of Public Utility Commissioners and prescribed its duties and powers. By §§ 21 and 22 of that act, the Board is vested with authority to protect the traveling public at grade crossings by directing the railroad company to install such protective device or devices and adopt such other reasonable provision for the protection of the traveling public at such crossing as in the discretion of the Board shall be necessary.

Section 38 of this act, as amended by Chap. 130 of the Laws of 1918, provides that any order made by the Board may be reviewed upon certiorari after notice, and the supreme court is given jurisdiction to review the order and to set it aside when it clearly appears that there was no evidence before the Board reasonably to support the same, or that the same was without the

jurisdiction of the Board. If it should appear equitable and just that a rehearing be had before the Board, the supreme court may determine that such hearing be had, upon such terms and conditions as are reasonable.

The language of § 38 in respect to the appeal to the Supreme Court is much broadened by the construction of that Court. It has been established by its decisions that the legislature of New Jersey may not impair the powers of the Supreme Court and the court of chancery as they existed when the state Constitution was adopted, and there is much latitude in their jurisdiction growing out of this. Traphagen v. West Hoboken, 39 N. J. L. 232; Flanigan v. Guggenheim Smelting Co. 63 N. J. L. 647, 44 Atl. 762, 7 Am. Neg. Rep. 113; Re Prudential Insurance Co. 82 N. J. Eq. 335, 88 Atl. 970.

The case of Public Service Gas Co. v. Public Utility Comrs. 84 N. J. L. 463, 87 Atl. 651, s. c. 87 N. J. L. 581, L.R.A.1918A, 421, P.U.R.1915E, 251, 92 Atl. 606, 94 Atl. 634, 95 Atl. 1079, construing § 38, as amended, is an illustration. It came before the supreme court on certiorari for consideration whether rates fixed by the Board for a public service gas company of Passaic were unjust, discriminatory, and unreasonable. The Supreme Court said of § 38:

"If this language is taken literally, we should be powerless in any case within the jurisdiction of the Board to set aside its order if there was any evidence to support it, no matter how overwhelming the evidence to the contrary might be. It is needless to say that such a literal construction of § 38 would bring it into conflict with our Constitution. It needs no act of the legislature to confer on us the power to review the action of an inferior tribunal, and the legislature can not limit us in the exercise of our ancient prerogative. That the legislature did not intend to do so is made clear by a consideration of the whole act. We are, by the express terms of § 38, authorized to set aside the order when it is without the jurisdiction of the board. The jurisdiction of the Board to fix rates is, by § 16c, limited to cases where the existing rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential. The only words important for the present case are unjust and unrea-

sonable, since the Commissioners themselves went no further in their adjudication. To determine then whether the Commissioners had jurisdiction, we must first determine whether the existing rate was unjust and unreasonable, and in determining that fact we are not limited to the question whether it clearly appears that there was no evidence before the Board to support reasonably its order; § 16c does not purport to limit the scope of our inquiry into the fact, and we must, therefore, determine it in the usual way, according to the whole of the evidence."

The supreme court proceeded itself to consider all the evidence in the case and to find whether the old rate was unreasonably high and the new rate reasonable. It said:

"All these considerations lead us to the conclusion that if there is any presumption in favor of the order of the Commissioners, it depends like the opinion of the court of another state upon the strength of the reasoning by which it is supported. This is subject, however, to the qualification that in legislative action the courts will not merely substitute their judgment for that of a legislative body. We must, therefore, determine for ourselves upon all the evidence whether the former rate for gas in the Passaic district was unjust and unreasonable and whether the new rate is just and reasonable."

The case went to the court of errors and appeals, and the action was affirmed on that opinion. There may be some confusion in a review of cases on certiorari by the supreme court of New Jersey; but the Passaic Case has never been overruled, and under it there is an appeal to a court which may examine the facts and the law independently as to the justice and reasonableness of the order. It is true that the court said that the case before it was not technically a confiscation case, but it resembled it so much that it used cases from this Court on confiscation to guide its rulings, and said:

"Since all cases of the kind may come before that tribunal and its decisions upon the constitutional questions would be binding upon us, we ought to adopt the same rule."

The Passaic Case was followed in the consideration of the same § 38 in Erie R. Co. v. Public Utility Comrs. 89 N. J. L.

57, 68, 98 Atl. 13, s. c. 90 N. J. L. 672, 103 Atl. 1052, a grade crossing case in which the supreme court said:

"The next ground of attack is that the evidence taken before the Board of Public Utility Commissioners does not justify nor reasonably support the board's conclusion or findings. To that end the insistence is that this court has power and should review the Board's findings of fact. We understand such to be the power of this court."

Objection is further made to this remedy before the supreme court that it is by certiorari and is within the discretion of the court. That, however, is hardly a serious obstacle. As Chief Justice Kinsey, in State v. Anderson, 1 N. J. L. 318, 328, 1 Am. Dec. 207, said:

"As upon a certiorari, the court have by law a discretionary power; I do not mean by this a power to do what they please, not directed by law and precedents, but, to employ the language of a great judge, to be confined to those limits within which an honest man competent to the discharge of the duties of his office ought to be confined."

This court said of provisions for certiorari in a California statute like this, i. e., Napa Valley Electric Co. v. Railroad Commissioners, 251 U. S. 366, 64 L. ed. 310, P.U.R.1920C, 849, 854, 40 Sup. Ct. Rep. 174:

"In those cases the applications for writs of certiorari were denied which was tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California."

But if for any reason that remedy, as defined in those decisions, should not be available or be inadequate, it would seem to be clear that resort then might be had to the court of chancery. In Allen v. Distilling Co. of America, 87 N. J. Eq. 531, 543, 100 Atl. 620, the court of chancery in New Jersey used this language:

"So long as courts of equity are to serve the purpose of the creation of the court of chancery of England,—and in this state the court of chancery is the successor, in all that such terms implies, of that court,—jurisdiction must depend only upon the

existence of, or a threatened wrong, and the absence of an adequate remedy at law. . . . Due to our habit of endeavoring to find decided cases to fit each situation, we too often overlook the fundamental reasons for the creation or evolution of the court. It received no grant of express powers nor were express duties imposed upon it. The law courts were left to deal with the violation of all rights for which they could give an adequate remedy. The duty of relieving against any remaining wrongs was imposed upon the court of chancery."

We are of opinion that the infirmity in the Pennsylvania statute which was pointed out in Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 64 L. ed. 908, P.U.R.1920E, 814, 40 Sup. Ct. Rep. 527, is not present in the New Jersey statutes.

Affirmed.

Mr. Justice McReynolds is of opinion that the action of the Board of Public Utility Commissioners was unreasonable and arbitrary, and should be set aside. To permit the Commissioners to impose a charge of $100,000 upon the railroad under the pretense of objection to a 6 per cent curve in a country road is to uphold what he regards as plain abuse of power.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

EDWARD OTT

v.

JOHNSTOWN TELEPHONE COMPANY.

[Complaint Docket No. 7587.]

Service — Telephones — Use by nonsubscribers.

A storekeeper subscribing to unlimited telephone service was permitted to allow the incidental use of the instrument by guests, customers, and others in his store without requiring that such persons prove that they are subscribers, and the company was not permitted to discontinue service for such incidental use as long as the privilege was not abused.

[November 26, 1928.]

COMPLAINT against discontinuance of telephone service; complaint sustained and continuation of service ordered.

1 P.U.R.1929A.

By the **Commission:** The respondent company operates a telephone system in the city of Johnstown. Among its rules and regulations on file with the Commission are the following:

"15. The use of this company's service, except for toll is limited to the subscribers, their families, or employees in their interest. Subscribers have no right to allow other parties who are not subscribers to use the telephones.

"16. This company reserves the right to discontinue service and remove its equipment from the premises of the subscriber in case of failure to make prompt payment of bills when due, or when the rules and regulations of this company governing the service have been violated."

The complainant is a subscriber to the respondent's system, his phone being located in his grocery store in Johnstown. The service rendered to him is so-called "unlimited" service for which he pays a fixed monthly charge, there being no separate charge for local calls.

He was notified by the respondent that his phone was being used by nonsubscribers and service would be discontinued unless such practice ceased. Later he was advised by the respondent that the practice had continued and he would be required to exchange his telephone for a pay station with a coin box. He refused to make application for such change and service was discontinued. Thereupon he secured a preliminary injunction from the court of common pleas. After hearing the court refused to continue the injunction on the ground that the Public Service Commission has exclusive jurisdiction in the premises.

After the preliminary injunction was secured, service was restored to complainant and has been continued to the present time. The respondent states that service will be continued as long as he observes the rules and regulations of the company. Complainant fears that respondent may again discontinue the service for the same reason that it previously did so and asks that the Commission decide whether or not his action was such as to warrant the company in discontinuing his service.

The action of the company was based upon a report from a monitor who had listened in on the complainant's line and testified that she heard a number of calls made from his telephone by

persons who were not subscribers to respondent's service nor employees or members of the complainant's family. The complainant denies that his telephone is used by the general public. The instrument is located behind the counter in his store near the cash register and in such a position that its use by the general public would interfere with the conduct of his business. He states that it is used only by his employees, the members of his family, customers in his store who wish to call their homes and occasionally by salesmen. He states that it is not used generally by nonsubscribers in the vicinity.

It seems that the respondent interprets its rule to permit the use of telephone of its subscribers by other subscribers but that persons who are not subscribers to any telephone are not permitted to use a subscriber's telephone excepting at pay stations.

The rule of the respondent is intended to prevent nonsubscribers from securing free telephone service in order to avoid payment of the regular charges. However, it is the universal practice for telephone subscribers to permit the incidental use of their telephones by guests, customers, and others who are in their homes or business places for some other purpose, without requiring that such persons prove that they are subscribers. The rule of respondent, if interpreted to permit such incidental use of a subscriber's telephone, is reasonable.

The evidence in this case does not indicate that the complainant had permitted his telephone to be used by the public in the vicinity for the purpose of avoiding the payment of charges or that it was generally used by nonsubscribers. In its application of its rules, the respondent acted without the consideration due to the rights and needs of its subscribers. Its attitude in this instance is typical of that in many cases previously called to the attention of the Commission in which it caused justifiable irritation by unreasonable application of rules or arbitrary disregard of complaints. The best interests of the company, no less than the rights of its subscribers, require that its public relations be handled in a spirit of fairness and consideration. The attitude of the respondent as exemplified in this case, if continued, will be injurious to the company by destroying the public confidence which is essential to efficient service to the public.

We find the action of the respondent in discontinuing the complainant's telephone under the facts here present to have been unwarranted and not in conformity with a reasonable interpretation of its rules. The complaint will be sustained and an order issue directing the respondent to continue to render service to the complainant so long as he observes the rules and regulations of the respondent including Rule 15 as herein interpreted. [Order omitted.]

NEW YORK DEPARTMENT OF PUBLIC SERVICE.
STATE DIVISION, PUBLIC SERVICE COMMISSION.

GELSAM REALTY COMPANY, INCORPORATED

v.

NEW YORK TELEPHONE COMPANY.

[Case No. 5185.]

Service — Extra directory listing for subtenants — Telephones.

1. The rule of a telephone company refusing to list names of subtenants in its directory notwithstanding the installation of a central switchboard and auxiliary equipment by the operator of a building for the extension of service to each tenant as part of the rental was held to be a reasonable and proper retention by the utility of its control over its own service, p. 226.

Service — Duty to serve — Intervening third party.

2. The policy of permitting the intervention of a third party between a utility and the ultimate user of its product, is not one which should be encouraged, unless and until changed situations or different public demands require such action, p. 227.

[November 27, 1928.]

COMPLAINT against refusal of telephone company to accord special telephone directory listings to tenants; complaint dismissed.

Appearances: Samuel Geller, New York city, President, Gelsam Realty Company, Inc.; Edward W. Beattie, New York city, for New York Telephone Company.

Opinion by **Blakeslee**, Counsel, approved by the Commission: Complainant owns and operates an office building at 126 West

34th street, New York city, and rents small offices to tenants whom he furnishes with telephone service from a main switchboard. Some time since he applied to the New York Telephone Company to list such tenants separately under telephone number "Longacre 7757." The company refused to make such listing.

Samuel Geller, president of the Gelsam Realty Company, Inc., admitted that when he applied for a switchboard and service at 126 West 34th street, he was made aware of the company's fixed rule, which was also called to his attention in a letter, as follows:

"This company's rates, rules and regulations governing the furnishing of telephone service are based upon the principle that the service to be furnished is for the subscribers' own use."

Service was first established for the Gelsam Realty Company, Inc., in December 1927. At that time no subtenant listings were requested. Complainant claims that it is impossible to rent small offices to small business men at a profit unless telephone service with individual listings can be secured, and further contends that the restriction of the installation of private branch exchange systems for the purpose of furnishing general exchange service to other than the subscriber and his immediate representative (except for hotels and apartment houses in connection with which stations may be located in stores, shops, or other business places in the same building for house service only and not for general exchange service use), is improper and discriminatory.

Mr. Geller was the only witness for complainant and the foregoing substantially covers the allegations of his complaint, except that he insists the present telephone contract at $4.75 (for individual listings, per month, including a fixed number of messages), is out of proportion to the rent which small business men can pay for office space in rooms such as are rented by his company.

New York Telephone Company claims that in furnishing service to users it contemplates direct contractual relations; direct co-operation with users in all matters affecting their service; and a direct settlement of accounts, including any claims or adjustments that may be required. That in accordance with this conception of telephone service it has based its classes of service, the design of its equipment and its rate structure. That in October, 1915, a tariff provision was filed known as "P. S. C. N. Y. No. 1,

§ 7," and as revised and amended is 6th Revised Sheet No. 2, and still in effect, which provides:

"A business message rate extension station may be located at any point designed by the subscriber except as stated below. Installations of private branch exchange service systems for the purpose of furnishing general exchange service to other than the subscriber, and his immediate representatives are restricted to hotels and apartment houses, in connection with which stations may be located in stores, shops or other business places in the same building for house service only, and not for general exchange use. In such cases where exchange service is desired in addition to house service, separate application must be made."

The company claims that this tariff provision was designed to prevent the growth and development of just such a scheme for furnishing telephone service to subtenants.

[1] The outstanding reasons to my mind, against complainant's contentions here are found in a consideration of the situation which would exist if applications such as his were granted:

(1)-It would establish a third party between the telephone company and the users of its service.

(2) The middleman would use only such equipment as he considered necessary.

(3) All of the company's dealings with the real users of its service would have to be through the medium of this third party over which the company would have no control, since presumably the middleman would not be considered a utility.

(4) Many difficulties would be thrown in the way of providing efficient service, not only from the standpoint of the telephone utility but also in the way of regulation, and service complaints would undoubtedly multiply with very little chance of reasonable or timely correction and adjustment.

(5) Further, if the practice were acknowledged and followed, there seems to be no limit to such utility service, because it could not be restricted to one building or a group of buildings or even to an entire city block.

Although some gas and electric companies in the city of New York and elsewhere have been permitted to furnish this kind of service, it does not appear to justify a direction by this Commis-

sion to the telephone company to permit such a practice. For there are many differences between the service furnished by a telephone utility and that of a gas or electric company. In the one instance, a specified commodity is delivered, capable of admeasurement, comparison, and restriction as to quantity and quality. In the other case, what is essentially provided is an instrumentality for service because two parties are required to every telephone conversation, and if there be faulty operation of connections or poor service, the other party to the conversation suffers equally with the subtenant or the person procuring such service through the middleman. In electric and gas service, only one person, that is, the ultimate consumer, is interested so far as service goes, and no one but he is affected by the quality of the product furnished.

In the ordinary private branch exchange the subscriber is really the only user of the service for he is operating it in his own interest and can thoroughly control the character of such operation, but where service is furnished to subtenants or other independent subscribers, the party operating the switchboard, not being the real user of the service, does not have the same interest in the character of operation that the private branch exchange subscriber or the telephone company itself has.

[2] The company having had a prohibition filed against this character of service for many years, based on reasons which seem sound and equitable, it would seem that the complaint should be dismissed, both on the record here reviewed and further, that the policy of permitting the intervention of a third party between a utility and the ultimate user of its product, is not one which should be encouraged, unless and until changed situations or different public demands require such action. An order dismissing the complaint is hereto attached. [Order omitted.]

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

ALEXANDER MacINTOSH

v.

GREENSBORO GAS COMPANY.

[Complaint Docket No. 7717.]

Service — Discontinuance — By-passing of gas meter.

A gas company was held to be justified in discontinuing service and removing its meter from premises of a plumber in which it claimed that an independent system of his piping had been installed for passing gas by the meter without registration, notwithstanding the fact that the individual had been acquitted by the criminal court and the premises in question, together with any incriminating evidence which might have existed, had been destroyed by fire.

[November 26, 1928.]

COMPLAINT of gas consumer against discontinuance of service and removal of meter; complaint dismissed.

By the **Commission:** Complaint is made in this proceeding that respondent gas company refuses to supply the complainant with gas at his residence located within the territory served by it.

It appears from the record that complainant is a plumbing contractor and on February 6, 1926, and for some time prior thereto, was being supplied with gas by respondent. On that date the company shut off the gas at the stop in the street and removed the meter from the premises, on the ground that complainant had installed a by-pass in the service line outside of the meter, and so obtained and used gas without registering its consumption. Since that time respondent has refused to supply complainant, and on the statements of respondent's employees, complainant was indicted and tried in the proper court for wrongfully tampering with respondent's facilities and taking its gas without paying therefor. Complainant was acquitted of the charge but required to pay the costs of the prosecution.

The record obtained before the Commission contains much contradictory testimony; that offered by the respondent indicating that complainant's house was equipped with additional piping hidden in the walls for unmetered gas, and that of complainant denying this fact. Testimony as to whether complainant's

house was equipped to use coal and electricity as well as gas for heat and light is likewise conflicting. As the premises have been destroyed by fire since the removal of the meter, no evidence can be obtained by an inspection of them. Respondent company estimates, by a comparison with the amount of gas consumed in other houses of a similar kind and housing the same number of people, that the amount of gas consumed without payment was worth approximately seventy dollars under the tariff rates then in effect.

Although a public service company doing business in this Commonwealth, may not arbitrarily or capriciously discriminate in the selection of its patrons within the territory in which it functions, it cannot be required to render its public service or supply its patrons with its commodity without just and reasonable compensation. And it may promulgate reasonable rules and regulations for the conduct of its business to the end, in this instance, that proper supervision and inspection of its facilities may be had.

After having carefully considered all the facts and circumstances of record in this case, we cannot find that respondent acted arbitrarily or capriciously in removing its meter from complainant's premises and in thereafter refusing to supply him with its service and commodity. Therefore, an order will issue dismissing the complaint.

We do not doubt that if and when complainant pays to respondent the amount it estimates to be just and reasonable for the unmetered gas consumed by petitioner, makes proper application for restoration of service, and submits himself to the company's reasonable rules and regulations, service will be restored; if it is not, a complaint may then properly be filed with this Commission.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

RE SPRINGFIELD GAS LIGHT COMPANY.

[D. P. U. 3223, 3280.]

Rates — Gas — Service charge.

1. Increased rates which would place a service charge for small

domestic consumers of a gas company operating in a city in excess of 50 cents a month were held excessive, p. 230.

Service — Gas — Reduction in B.T.U. content.

2. The Department indicated that it would permit a reduction of B.T.U. content in gas supplied by a city utility from 528 to 500 upon the filing by the company of a corresponding reduction in rates or else a presentation of the matter at a public hearing in order to give protestants an opportunity to be heard, p. 231.

[November 30, 1928.]

PETITION of customers of a gas company protesting against new schedule of rates; new schedule cancelled and rates in existence at the time of filing thereof reinstated.

By the **Department**: The Springfield Gas Light Company filed a schedule of rates to become effective June 1, 1928, establishing a net charge of 65 cents for the first 100 cubic feet of gas, 18 cents per hundred for the next 400 cubic feet, and 10 cents per hundred for the next 49,500 cubic feet of gas. Customers of the company filed a protest against the new schedule and also filed a petition for a reduction of rates. Public hearings were held, at which the customers and the company were represented and offered testimony. The effective date of the schedule was suspended to December 1, 1928.

[1] The rate which the company seeks to establish for the first 50,000 cubic feet of gas is, in effect, a service charge of 87 cents per month with a commodity rate of $1 per thousand cubic feet to all customers using 500 cubic feet or more per month. The costs directly attributable to each customer, without allocation of any other expenses, do not, in our opinion, materially exceed 50 cents per month. No facts have been presented which satisfy us that this company ought to be allowed a larger service charge than that. It follows that we cannot approve of the schedule filed by the company.

The customers, through their expert witnesses, proposed a rate which they called the "people's rate," consisting of a service charge of 50 cents per month per customer and a commodity rate of $1 per thousand cubic feet of gas. This commodity rate is manifestly too low because its proposer, in calculating the reduction of the company's income as the result of such rate, admitted-

ly did not take into consideration the use of gas by customers consuming more than 5,000 cubic feet per month.

The present rate is $1.35 per thousand cubic feet. We are of the opinion, after careful study of all the facts, that a service charge for this company should not exceed 50 cents per month.

[2] Last spring, the company orally applied to the Department for exemption from the calorific standard of 528 B.T.U., established by the Department, and requested that the Department determine that 500 B.T.U. be required of gas supplied by the company to its consumers. At that time, on the advice of our director of the gas and electric division, we were inclined to the opinion that, if the company could see its way clear to make a reduction of 5 cents per thousand in its commodity price, it would be wise, in view of the kind of gas that the Springfield Gas Light Company was making, to reduce the standard to 500 B.T.U. There are many gas engineers who are convinced that, in the making of certain types of gas, advantages are derived by the public in a lower B.T.U. standard with a reduced price, it being contended that the lower B.T.U. gas is a firmer gas and results in a more uniform quality of gas at the burner. The company was disinclined at that time to make as large a reduction as 5 cents per thousand feet and, as a result, no written application was made by it. We think in any event that any such change should not be made without a public hearing which gives an opportunity to customers affected to be heard, as it may be that they can present evidence to indicate that the reduction in the British Thermal Units is not compensated by a reduction of 5 cents per thousand cubic feet. If the gas company should, however, make application for a reduction of the standard to a basis of 500 B.T.U., and it should meet with our approval, we would then be prepared to grant the reduction in the standard provided that the company filed a schedule providing for a 50-cent service charge and a commodity rate of $1.05 per thousand cubic feet. Such a rate would reduce the price of gas to all consumers using 1666 cubic feet or more per month and would result in a saving to the customers of at least $60,000 per year.

In the meanwhile the schedule filed by the company should be cancelled.

OHIO PUBLIC UTILITIES COMMISSION.

RE LOGAN GAS COMPANY.

[Advanced Utility Rate Proceeding Nos. 189-192.]

Rates — Municipal control — Legal authority.

1. The provisions of the Constitution and statutes of Ohio give to municipalities the absolute right to fix rates directly by ordinance contract with a public utility, thereby relieving the Commission of jurisdiction with reference to gas rates therein, together with adjacent territory and rural communities subject to the same rates, p. 234.

Rates — Reasonableness — Burden of proof.

2. A preponderance of evidence is required in order to establish legally a proposed rate increase as just and reasonable where by statute the utility has the burden of proof to show that such is the case, p. 234.

Valuation — Overheads — Contractor's fee.

3. A contractor's fee of 10 per cent was used as applicable to labor on pipe lines and buildings and material in buildings in valuing the plant investment of natural gas properties, p. 235.

Valuation — Working capital — Natural gas.

4. An allowance of 5 per cent was held to be fair and reasonable for working capital of natural gas properties, p. 235.

Valuation — Bond discount — Brokerage fees — Natural gas.

5. No allowance was made for bond discount or brokerage fees in appraising the reproduction cost of natural gas properties where the cost of financing had been fully cared for in the charge to capital account of necessary interest during the reproduction period, p. 235.

Valuation — Going value — Specific allowance unnecessary.

6. No special allowance for going value is necessary where the Commission in its valuation of utility property has made substantial allowance for organization, interest, engineering, law expenditures, taxes, general expenses during construction, working capital and contingencies and omissions, p. 236.

Valuation — Title to leased property.

7. It is unnecessary for the Commission in valuing natural gas properties for rate-making purposes to pass upon the actual ownership or title to the gas underground for which the company holds optional leases to exploit, p. 237.

Valuation — Optional leases to exploit gas.

8. The value of optional leases held by a natural gas company to exploit totally untested ground although admittedly a prudent investment cannot be included in the valuation of used and useful property for rate making, p. 238.

Evidence — Expert testimony — Interested parties.

9. The Commission was not convinced that the judgment as to the value of natural gas leases of experts themselves interested in the

natural gas business was unbiased in view of the importance which the value of such property might bear to their own interests, and in view of the absence of a market for such leases, p. 240.

Valuation — Market and exchange values — Natural gas leases.

10. Rates cannot be made to depend upon the exchange or market value of natural gas leases, p. 240.

Valuation — Natural gas leases.

11. The actual cost of leases for the exploitation of gas by a natural gas company is the only basis which should be used for rate-making purposes, notwithstanding the possibility of establishing a market value, p. 240.

Return — Commission jurisdiction — Gasoline extraction contract.

12. The Commission in determining whether or not the stockholders of a natural gas company are receiving a fair return on the property may consider the profits accruing from an arrangement by which another company, commonly owned, extracts gasoline and retains all the profits, p. 241.

Contracts — Reciprocal natural gas and oil well agreement.

13. A contract between a natural gas and an oil company whereby the former turns over all oil wells to the latter discovered while drilling for gas in return for the turning over of all gas wells discovered by the latter in drilling for oil was, in the absence of contrary evidence, taken to be reasonable and fair, p. 241.

Valuation — Drilling of dry holes — Natural gas.

14. The cost of drilling dry holes was included as a capital expenditure of a natural gas company, p. 242.

Valuation — General overheads — Natural gas.

15. An allowance of 7 per cent was made in the valuation of natural gas properties for general overhead exclusive of contingencies and omissions, p. 242.

[November 19, 1928.]

APPLICATION of a natural gas company for increased rates; valuation of properties made.

By the **Commission**: The Logan Gas Company, duly organized under the laws of this state, owns and operates certain gas properties within the state of Ohio and is engaged in the service of supplying natural gas in 56 incorporated municipalities and territory adjacent thereto, and various villages and rural communities. On February 7, 1925, it filed with the Public Utilities Commission of Ohio schedules providing increased rates to become effective March 9, 1925. Proceeding under § 614–20 of the Ohio General Code, the Commission by its order dated March 7, 1925, suspended the rates contained in the said schedules for a

period of One hundred and twenty days from February 7, 1925, and directed a joint public hearing thereon. The bond filed by the company securing and guaranteeing the repayment to consumers of such portion of said increased rate as might be unreasonable or excessive was approved by the Commission on June 12, 1925. Hearings in the matter began on May 5, 1925, and were had from time to time until April 27, 1928, when the case was submitted. Delay was occasioned partially by an attempt on the part of the company and representatives of the interested public to reach an amicable adjustment. These negotiations, as a whole, came to naught.

[1] Forty of the incorporated towns for which the said schedules were suspended have enacted ordinances fixing the rates to be charged by the company for gas supplied to consumers and this has resulted in relieving the Commission of jurisdiction with reference to gas rates therein, together with the adjacent territory and rural communities which are subject to the same rates.

Section 5, Article 18 of the Constitution of the state of Ohio provides:

"Any municipality proceeding to acquire, construct, own, lease, or operate a public utility, or to contract with any person or company therefor, shall act by ordinance; . . ."

Section 614–47 of the Ohio General Code is as follows:

"This act shall not apply to any rate, fare, or regulation now or hereafter prescribed by any municipal corporation granting a right, permission, authority, or franchise, to use its streets, alleys, avenues, or public places for street railway or street railroad purposes, or to any prices so fixed under §§ 3644, 3982, and 3983 of the General Code, except as provided in §§ 46, 47, and 48 (G. C. §§ 614–44, 614–45, and 614–46) of this act."

These provisions of Constitution and statute give the municipality the absolute right to fix rates directly by ordinance contract with a public utility. Ohio River Power Co. v. Steubenville, 99 Ohio St. 421, 124 N. E. 246.

[2] The latter paragraph of § 614–20 of the Ohio General Code establishes the law relative to the burden of proof in cases of the nature of the one now before the Commission. The language is as follows:

"At any hearing involving a rate increased or sought to be increased after this section shall have become effective, the burden of proof to show that the increased rate or the proposed increased rate is just and reasonable shall be upon the public utility . . . ."

The Logan Gas Company assuming that burden has presented its case. A preponderance of the evidence is required in order to legally establish the proposed increased rate as just and reasonable.

In rendering its opinion the Commission is guided by § 499–9 of the Ohio General Code which limits authority in fixing a valuation for rate-making purposes to property which is used and useful in the public service.

[3] The company and complainants are in accord as to the inventory of the respondent's physical properties and as to the unit costs to be applied to labor and material as of December 31, 1924, the date certain. The Commission has accepted, therefore, the figures set forth in the record for the above items. Included are varied percentages for direct overheads which are separate and distinct from certain allowances which later appear for general overheads; and still further, a contractor's fee of 10 per cent applied to labor on pipe lines and buildings and material in buildings is set forth. The actual estimated percentages for said direct overheads and contractor's profit are as follows: [Table omitted.]

Very reasonable structural unit costs have been used and the direct overheads employed appear proper in this case but they will in no way stand as a criterion where the conditions are otherwise.

[4] The amount of working capital which the company claims should be allocated to nonordinance towns as of December 31, 1926, shown on Exhibit No. 90, is $560,549. The term working capital as here used embraces materials and supplies but in light of the total value of the property the sum is too high. Five per cent appears fair and reasonable and has been employed by the Commission in fixing the tentative valuation.

[5] Ample allowance is made herein for interest during construction but nothing has been added thereto for bond discount

or brokerage as such; the fair cost of financing does not demand it. In estimating the cost of reproduction of this plant the Commission will not penalize consumers on an imaginary ground of poor credit of the Logan Company.

The testimony and exhibits, introduced in behalf of the company through witnesses Hill, Hamilton, Euler, Robb, Elmer, Harris, and McKee relative to the inclusion of a specific percentage for the difference between the par value of stocks and bonds of the utility and the amount of money which would be realized from their sale, do not present evidence which impress the Commission with any necessity for dealing with the subject in a manner different from that employed in similar cases heretofore decided by this body.

In view of what is shown concerning conditions of the money market, present hazards of natural gas companies, likelihood of depletion of supply, and the actual ability of Ohio gas companies to attract capital as of the date of reproduction, no other position is tenable. There is nothing out of which to construct a figure which could or should be applied to bond discount and, moreover, it may be noted that the Logan Gas Company possesses no funded debt. Nor does proof of cost of brokerage exist upon which an allowance can be properly predicated. The cost of financing in this case is fully cared for in the charge to capital account of necessary interest during the reproduction period; beyond this the consuming public should not be assessed.

[6] On the subject of going concern value, for which the company claims the amount of $2,259,816 should be included in the base used for rate-making purposes, the Commission, taking into consideration all the evidence relating to the matter and accepting as the law—

"That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use. . . ." Des Moines Gas Co. v. Des Moines, 238 U. S. 153, P.U.R.1929A.

59 L. ed. 1244, P.U.R.1915D, 577, 584, 35 Sup. Ct. Rep. 811, and also—"That 'going concern,' a live plant distinguished from a dead one, should be taken into consideration in fixing the rate base of the utility." Cincinnati v. Public Utilities Commission, 113 Ohio St. 259, P.U.R.1925E, 432, 458, 148 N. E. 817, finds upon careful analysis of this element that because—

(a) The going concern value in the property has been duly considered and recognized and is reflected within the items composing said valuation and the allowances for overheads and intangibles, and is fairly, reasonably, and truly reflected and shown thereby;

(b) Of the absence of any showing that the stockholders have suffered any sacrifice in the development of the business of the company for which they have not been recompensed by the rates charged to public;

(c) Of the lack of competition due to the practically monopolistic conditions under which gas companies operate in the state of Ohio, and

(d) Of the clear duty of the Commission to include in its valuation only those elements which are manifestly fair both to the utility and to the consumer, no additional allowance is necessary.

The Commission in making the valuation of the property has adopted unit costs which reflect the existence of a live plant and, in addition, has made substantial allowance for organization, interest, engineering, law expenditures, taxes, general expenses during construction, working capital and contingencies and omissions as well, and is convinced that the total is not less than its actual value as a going concern. See Hardin-Wyandot Lighting Co. v. Public Utilities Commission, 118 Ohio St. —, P.U.R.1928D, 560, 162 N. E. 262.

[7] The company through gas and oil leases holds 925,075.22 acres of land under much of which there may or may not be natural gas. As implied in the foregoing statement, it is not seized in fee of any of this acreage but by the terms of the said instruments possesses the exclusive rights for some years, providing a given rental is paid to the owners thereof at specified

times, to enter upon the premises and test for gas and oil and to remove them if they are discovered. The lessee may, of course, surrender these options to search for mineral deposits whenever it pleases and thereby terminate its obligation to pay further rent. There is a wide divergence of opinion between respondent and protestants as to the actual ownership of—or title to—the gas in the ground but the Commission does not deem itself called upon to determine the issue since the matter of allowance for leaseholds does not turn on this point.

The respondent claims a valuation of $14,000,000 for these leaseholds, classifying them as follows: (Company's Exhibit No. 80, p. 2.)

	Acres.	Value.
Class 1	75,541.56	$4,453,334.00
Class 2	119,759.71	$6,240,757.00
Class 3	156,517.45	$2,106,774.00
Class 4	533,256.49	$1,199,135.00

"Class No. 1 is leases of tracts of land having producing gas wells drilled thereon from which gas is being furnished to the public."

"Class No. 2 is leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands but which do not have any producing wells drilled thereon."

"Class No. 3 is leases of tracts of land shown by surrounding or neighboring developments or operations, geological considerations, etc., to be reasonably certain to be good gas lands, at least as to large portions thereof, but not yet demonstrated to be such by actual drilling."

"Class No. 4 is leases of tracts of land situate within the areas of territory where gas lands are known or assumed to exist from general geological conditions, but which are so remote from actual gas-producing wells or territory that they are merely prospective gas lands."

[8] At the net cost of $251,005.78 the respondent has acquired rights in these lands which it now values in millions maintaining that existing consumers should pay a return on the alleged present market value thereof. In all fairness to both the company

and the affected public this is a proposition which demands close scrutiny on the part of the regulatory body. Granting that a forwarding-looking policy is commendable and that a future supply of gas should be assured, if possible, common sense alone would seemingly deny any public service company the right to pyramid its reserve holdings at will and compel current users of a commodity to assume the financial burden entailed when it is certain that little, if any, of the additional acreage will ever benefit them.

The legislature in authorizing the Commission to ascertain and report the value of the property of utility companies meant to forestall the inclusion of such properties when it provided in § 499–9 that—

"The Commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, owned by each public utility or railroad, used and useful for the service and convenience of the public."

Were no such rule to be applied, natural gas companies could, at the expense of a few thousand dollars, justify any rate.

The matter, therefore, resolves itself first into the question, are these leaseholds in whole or in part used and useful for the service and convenience of the public?

The record reveals the fact that the producing wells of the Logan Gas Company are yielding a satisfactory volume of natural gas and their depletion is not imminent. The estimated capacity accepted by the Commission is recognition of anticipated life for at least the duration of the period for which such rates, as are found herein to be just and reasonable shall be in force and effect.

In no judicial sense can this Commission in good conscience find that the leases, or one cubic foot of the gas which may be under the leased acreage, in Classes 2, 3, and 4 are or is "used and useful" as that term is contemplated by statute. Merely because a company invests prudently and that which is acquired may become used and useful does not presently make it so. That the company's wells are draining any part of these lands is too problematical to cause the said classes to be considered by the Commission as being even useful. Nothing can be granted here-

in as value of or investment in those leaseholds for rate-making purposes.

Class No. 1, being leases of tracks of land having producing gas wells drilled thereon from which gas is being furnished to the public, may be termed "used and useful." The proved field is being drained of its resources for public consumption and the integrity of the flowing wells is maintained in setting up these lands as a barrier against direct encroachments.

[9–11] No exchange value is established for the leasehold acreage. The record in the case reveals the fact that there exists no market; witnesses Webber, Ewing, Meals, Gregory, and Pope each named a value for the different classes of leased land believed to be the consideration which would pass from a willing buyer to a willing seller but they did not establish anything seriously suggestive of an open market. Their methods of arriving at a conclusion may easily be criticised. These witnesses are all interested in the natural gas business and are very well informed men but it is only reasonable to suppose that their connections lead to them to regard highly all properties similar to those possessed by their own companies. In the absence of a market for leases which indicates a definite sale price the Commission is not convinced that the judgment of these men is unbiased since some of the issues involved here may be of importance to themselves. One cannot overlook the failure of those testifying to do more than propose the idea of selling the gas, which might be obtained, to industrial users. If there really were a demand for natural gas on the part of independent industries which would create a market value such as the respondent claims, thousands of acres of promising unleased and undeveloped land would have been leased and developed long ago. There are yet many unclaimed and untested fields in the state of Ohio to which those interested may turn and this may in a measure account for the nonexistence of a leasehold mart. Considering the location of this land and its use in the public service it is almost inconceivable that a market price can be determined which will not be based upon the rate at which the Logan Gas Company is selling gas to the public. That the rate cannot be made to depend upon exchange value which in turn depends upon the rate is the law through a long

list of supporting cases. Because of uncertainty and speculation, the only logical conclusion at which the Commission arrives in the face of the record and the law is that the fair value in purview of § 614–23 of the Ohio General Code, should be the cost of said Class No. 1 allocated to nonordinance towns, or $7,880.62, and the same hereby is allowed. Even though a market value were established by the evidence in the case the Commission is of the opinion that the actual cost of these leases to the company is the only one which should be used for rate-making purposes since it is eminently fair to both the public service company and its consumers; to proceed upon any other basis is to accept figures which are indeed speculative and unsound.

[12] Certain advantages apparently accrue to the Logan Company in having the gasoline extracted which is contained in the gas when it comes from the wells. Witnesses Hill and Welker testified that some loss is prevented by such extraction. The Commission does not question the weight of this evidence. Each year approximately two million gallons of gasoline are produced in this manner and the volume of the gas is naturally reduced proportionately not only due to the extracted product itself but to losses occasioned by the process employed. A corporation known as the Preston Oil Company which has the same officers as the Logan Gas Company and is commonly owned, does the actual work of removing the gasoline. A contract exists between the Logan Company and its extracting subsidiary by the terms of which the Preston Oil Company is to receive all of the profits resulting from the extracting. Although none of these profits are turned over to the Logan Company it is maintained that it is sufficiently compensated by the improved condition of the gas. This Commission in determining whether or not the stockholders of the Logan Gas Company are receiving a fair return on the property holds that it may consider what the arrangement really profits them. The companies having the same stockholders, we find that the net profit on the sale of the gasoline should be included in the revenues of the respondent. In 1923 the net earnings were $238,111.77; in 1924, $165,815.61; in 1925, $163,810.87 and in 1926, $152,678.51.

[13] A working agreement is observed by the Logan Gas Com-

pany and The Preston Oil Company by the terms of which the former is required to turn over to the latter all oil wells discovered in the course of drilling for gas and the latter as consideration therefor turns over to the former all gas wells found by it in its search for oil. The Commission cannot determine accurately, from the meager evidence on the subject, whether the respondent has gained or lost pecuniarily in these transactions but since the contract bears marks of being sensible and reciprocally accommodating the result will be accepted as a stand-off.

[**14**] The cost of drilling dry holes must be taken care of either in operating expense or in capitalization. It has been included as a capital expenditure by the respondent and the Commission will do likewise since there is little difference in the cost to the consumer in the two methods.

[**15**] For general overheads 7 per cent is used. Nothing is included in this percentage for contingencies and omissions because those items are covered in the direct overheads under the title "Incomplete Inventory" on material and "Contingencies" on labor.

The company claims as the cost of reproduction of all its properties, less depreciation, as of December 31, 1924, $49,221,861. This figure is of no moment in the present case and the Commission merely quotes it, making no finding in regard thereto. Through Exhibit 90 the rate base contended for is divided thus:

Ordinance group	$18,829,451
Nonordinance group	25,355,144
Wholesale group	6,203,527

The cities of Chillicothe and Newark later passed ordinances providing for natural gas rates and the Logan Company accepted them. On that account the value of those properties must be deducted from the nonordinance allocation and added to the ordinance group. The sum which should be allotted to nonordinance towns, according to the respondent, appears to be approximately Twenty million five hundred thousand dollars. This statement is only made by way of explanation and the amount is not adopted by this body.

The Commission, being fully advised in the premises, finds that the following is the true and correct tentative valuation of

the properties of the Logan Gas Company to be considered for rate-making purposes, together with the necessary allocations to nonordinance towns and surrounding territory, as of December 31, 1924: [Allocation table omitted.]

Total, $10,769,077.04.

It is, therefore, *ordered,* That notice of such valuation so placed upon said property be transmitted by registered letter to the said Logan Gas Company and to the mayors of the various cities and villages herein enumerated; all as provided for under § 499–12 of the General Code of Ohio. It is *further ordered,* that all inventories, valuations, transcripts, and exhibits be filed and considered as a part of the record herein. It is *further ordered,* that the Commission reserve the right, in the event it shall determine the aforesaid inventory to be incomplete and inaccurate, or that said valuation is incorrect to make such changes therein as may be necessary before said tentative valuation shall become final.

WISCONSIN RAILROAD COMMISSION.

RE CITY WATER COMPANY OF MARINETTE.

[U-3540.]

RE CITY WATER WORKS COMPANY OF MERRILL.

[U-3541.]

Return — Operating expenses — Cost of overhead service by affiliated company.

A contract for overhead services to a local operating utility by an affiliated construction company dividing the cost of actual services performed for the former by the actual cost of construction performed for all subsidiary water companies controlled by the holding company, not to exceed 15 per cent of the actual cost of construction which was performed under the contract, was approved in view of the fact that the construction company was incorporated solely for service and convenience in allocating expenses between various local subsidiaries and not for profit.

[June 19, 1928.]

INVESTIGATION on motion of the Commission into the reason-

ableness of charges to fixed capital on books of various water companies; contracts for such payments approved.

By the Commission: This decision and order is, in effect, supplementary to the Commission's order, in the above entitled matters, dated July 19, 1927.

The cases originally arose from facts disclosed by inspections of the accounting records of the City Water Company of Marinette made on July 23, 1926, and of the accounting records of the City Water Works Company of Merrill, Wisconsin, on September 2, 1926. It was shown that all construction work for these companies is performed nominally by the American Construction & Securities Company and the stock of construction and repair materials, maintained at the plants of these companies, is owned by that company. Prior to January 1, 1927, when any construction work was performed or materials used, the charge to these companies made therefor by the construction company included an amount equal to 15 per cent of the direct cost of the work performed and materials used.

The water companies involved in this case, as well as the American Construction & Securities Company, are controlled by the American Water Works & Electric Company. The 15 per cent, which was added to the cost of construction work performed for and materials furnished to these water companies by the construction company, was in accordance with the terms of contracts which these companies had entered into and, it is claimed, was intended to reimburse the construction company for services which it performed for the water companies. The records did not disclose any information relative to the nature or amount of these services and consequently there was nothing in evidence to substantiate the reasonableness of the amount added as the cost of such services.

Therefore, the Commission, on February 28, 1927, issued, on its own motion, notices of investigation of these matters, and a joint hearing was held at Madison on March 23, 1927.

The testimony at this first hearing developed the fact that the construction company had no record to show the specific expenses incurred in rendering the services of an overhead nature. There was, therefore, nothing in the testimony on which

to base an opinion as to the reasonableness of the 15 per cent charge.

It was the opinion of the Commission, expressed in its decision of July 19, 1927, that the mere existence of a contract between these companies did not alone justify approval of charges made in accordance with the terms thereof, since none of these companies are free agents but are under the control of the American Water Works & Electric Company; that the charges for these overhead services, in order to be considered reasonable, should bear a close relation to the cost of performing them; and that all charges of this nature should be substantiated by evidence showing the specific services for which the charges are made and the construction projects which make them necessary. Accordingly the companies were directed to discontinue the practice of including in charges to capital accounts, as representative of the overhead costs, a fixed percentage of the direct cost to American Construction & Securities Company of construction work chargeable to capital accounts. The order of July 19, 1927, also provided that if City Water Company of Marinette and City Water Works Company of Merrill wished to substitute for their then practice some method of charging overhead expense in conformity with the general requirements set forth in the decision, such method should be submitted to the Commission for approval or modification.

Under date of December 5, 1927, the two companies submitted copies of new contracts entered into with American Construction & Securities Company, effective January 1, 1927. Hearing was held May 3, 1928, at Madison. Two appearances were entered: C. H. Dickey, attorney for American Construction & Securities Company, and L. M. Everet, city attorney of Marinette.

The new contracts, which are alike in all respects, differ chiefly from the former contracts in providing that the percentage charge for the overhead services in connection with additions and betterments shall be determined by dividing the cost of these services performed by the construction company by the actual cost of construction work performed for all subsidiary water companies operated and controlled by American Water Works & Electric Company, Incorporated, for the preceding year, except that in

no case shall the charge for overhead exceed fifteen per cent of the actual cost of the construction work performed under the contracts. Under the new contracts this percentage, for 1927, was 10; according to the testimony given at the hearing of May 3, 1928, the charge for 1928 is to be 9 per cent.

A review of the contracts and of the testimony taken leads us to the opinion that the present arrangement, while it is not as satisfactory as it would be if the construction company's accounts permitted analysis of specific overhead costs to the individual plants in the system, is a method reasonably equitable and should be approved.

Furthermore, there was direct testimony submitted that American Construction and Securities Company was not conceived and organized as a profit-making venture but merely as a convenient instrument for simplifying the accounting problems of American Water Works & Electric Company, and that the present contracts contemplate the operation of the construction company at cost and without profit.

INDIANA PUBLIC SERVICE COMMISSION.

RE COMMONWEALTH TELEPHONE CORPORATION.

[No. 9357.]

Valuation — Discrepancy of estimates.

1. An estimate of value by the Commission's engineer of $35,099 on utility property showing a book value of $28,439.76 and a tax value of $16,560 was accepted only for purposes of calculating the rate of return to be yielded by the proposed rate, but was not given further weight in view of the unexplained discrepancy between the figures, p. 248.

Depreciation — Percentage allowed — Telephone company.

2. Proposed allowance of 5 per cent for depreciation was modified to 4 per cent, p. 248.

Return — Percentage allowed — Telephone company.

3. Rates yielding a rate of return of slightly less than 7 per cent on telephone property were held to be reasonable, p. 248.

[June 29, 1928.]

APPLICATION by telephone utility for authority to increase rates; rates adjusted.

P.U.R.1929A.

Appearance: L. C. Loughry, for petitioner.

Harmon, Commissioner: On the 11th day of May, 1928, petitioner filed its petition herein, in words and figures following, to-wit:

"Commonwealth Telephone Corporation represents and shows that it is a corporation organized under and by virtue of the laws of the state of Indiana, and is a public utility within the purview of the Shively-Spencer Utility Commission Act.

"Petitioner further represents and shows that among others, it owns and operates telephone exchanges at Cicero and Deming, Indiana, serving approximately three hundred fifty subscribers; that an appraisal of the telephone property of your petitioner used and useful in serving subscribers in and around its Cicero and Deming exchange areas was made by the engineering department of your Commission as of September 1, 1927, and is as follows:

Cost of reproduction	$41,534
Present value	30,946

"That said appraisal figures do not include any allowance for going value or working cash capital; that since the date of said appraisal your petitioner has been engaged in the rehabilitation of its property in its Cicero and Deming exchange areas.

"Your petitioner further represents and shows that its present rates for service at Cicero and Deming are as follows:

Class of Service.	Per Month. Gross.	Net.
Single line business	$2.25	$2.00
Party line business	2.00	1.75
Single line residence	2.00	1.75
Party line rural	1.75	1.50
Extension phone	.75	.75
Extension bell	.10	.10

Bills paid on or before the 15th day of the second month of the quarter in which service is rendered, the net rate to be charged; otherwise the gross rate to be charged.

"Petitioner further represents and alleges that its present rates for service at Cicero and Deming are insufficient, unreasonable, and inadequate to yield petitioner a fair return upon the fair value of its property dedicated to public use at said exchanges and to provide for depreciation.

"*Wherefore,* petitioner, Commonwealth Telephone Corporation, prays your Honorable Body that after such investigation and hearing as the Commission may deem necessary, that it may be granted authority to place in effect and charge and collect at its Cicero and Deming exchanges rates that will yield petitioner a fair return upon the fair value of its property dedicated to public use."

. . . . . .

The said cause was set for hearing on Monday, June 4, 1928, at the court house at Noblesville, Indiana, at 10 o'clock A. M. of said date, and due and legal notice by publication and otherwise was given of the time and place of such hearing to all interested persons.

[1] It was shown by the appraisal of the engineering department of the Public Service Commission that the value, including going value and working capital, of the property on which petitioner was entitled to earn a return, was $35,099. This value is not accepted by this Commission, but is simply used for the purpose of making a computation of rates herein. The reason the value is not determined is because the annual report of this utility filed on September 30, 1927, shows the book value of the utility to be $28,439.76; and valuation for taxes to be $16,560. There may be a good reason for the discrepancy, but enough question is raised in the mind of the hearing Commissioner to call specific attention to these startling differences. Were it possible for the Commission to make any reduction in this appraisal of its own volition without entirely disregarding the evidence offered, this seems to be a case in which this should be done.

[2] In the instant case petitioner asked that the Commission set up a depreciation of 5 per cent. This figure the Commission regards as too high, and instead will fix a figure of 4 per cent on depreciable property amounting to $29,257.

[3] The petitioner also asked for an 8 per cent return. This figure is also too high in the opinion of the hearing Commissioner, 7 per cent under the circumstances in this case being all that could reasonably be justified.

The cost of the Commission's appraisal covering the property

of the Commonwealth Telephone Corporation at Cicero and Deming, Westfield, Jolietville, and Windfall, Indiana, has been divided among the several exchanges and $36.75 of the cost of such appraisal has been allowed to each particular exchange. With this explanation it would seem that the requirements of the Cicero and Deming exchanges are set forth in the following tabulation, together with the revenues necessary to meet them:

Requirements.	For Seven Months Period.	Projected.
Operating expenses without depreciation	$3,033.38	$5,188.88
Commission's appraisal		36.75
Depreciation 4 per cent of $29,257		1,170.28
7 per cent return on $35,099		2,456.93
Total requirements		$8,852.84
Revenues.		
Exchange service—proposed rates	$6,786.60	
Toll—year 1927	1,404.44	
Miscellaneous	78.72	8,269.77
Less than requirements		$583.07

It will be noted that the revenues produce $583.07 less than a 7 per cent return on $35,099. However, the Commission feels that the return is adequate on the investment on which the utility is entitled to a return, taking into consideration all of the elements hereinabove referred to.

It is therefore *ordered* by the Public Service Commission of Indiana that petitioner be and it is hereby authorized to put into effect and charge the following rates, towit:

Classification of Service.	Per Month. Gross.	Net.
Private line, business	$2.90	$2.75
Party line, business	2.40	2.25
Private line, residence, town	2.15	2.00
Party line, residence, town	1.90	1.75
Party line, residence, rural	1.65	1.50
Party line, residence, rural (owns own phone)	1.40	1.25
Lodges	1.65	1.50
Extensions	.90	.75
Extension bell	.25	.10

Bills in town shall be payable monthly. Bills in rural districts shall be payable quarterly. If bills are paid on or before the 15th of the month for which bill is rendered the net rate shall apply, otherwise the gross rate to apply. If bills payable quarterly are paid on or before the 15th of the second month of the quarter for which bill is rendered, the net rate to apply, otherwise the gross rate to apply.

It is *further ordered* that the above rates shall be and become

effective upon the filing by petitioner with the tariff department of this Commission and shall post and keep posted in its office in full view of the public during the entire period in which such schedule is in effect, a printed or typewritten copy of the schedule of rates hereinbefore prescribed; and the payment by the utility of the sum of $3.04; costs occasioned by the filing and giving of notice in this cause, the said sum to be paid to the state of Indiana through the secretary of this Commission.

Singleton, Ellis, McIntosh, concur; McCardle, absent.

INDIANA PUBLIC SERVICE COMMISSION.

ESCHELMAN & SONS

v.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

[No. 7279.]

Reparation — State-wide rate adjustment — Railroads.

Reparation does not necessarily follow where rates are reduced as the result of a state-wide rate readjustment, and where there is no evidence that the specific rates under which the charges were made were not of themselves unreasonable or unlawful, reparation will be denied.

[June 15, 1928.]

PETITION for award of reparation; denied.

By the **Commission:** This proceeding comes on upon complaint of Eschelman & Sons and attacks the rates on sand and gravel, carloads, from Terre Haute, Indiana to St. Marys of the Woods, Indiana. Reparation is sought.

By order under the above docket number approved November 16, 1923, the matter was dismissed because of lack of jurisdiction under a decree of the United States District Court, dated June 1922. Said decree contained certain provisions with respect to its application as set forth in the order. Subsequently,

on December 21, 1923, the Commission vacated said order of November 16, 1923, and thereafter set the proceedings for further hearing. Said hearing was had on July 8, 1926.

The evidence consisted of statement of rates, including those applicable to shipments of sand and gravel from Terre Haute to St. Marys of the Woods, during the period June 24, 1918 to July 1, 1922, and rates applicable to like traffic in adjacent territory. It shows a variety of rates and the general chaotic condition of rates on this commodity at time of shipment.

It further shows a rate voluntarily established by carrier of 29 cents a net ton in effect on June 24, 1918. This rate was increased under D. G. R. Order No. 28 to 50 cents and on March 15, 1921 to 70 cents by order of the Interstate Commerce Commission under Order No. 11894. The 29-cent rate voluntarily established by the carriers appears to be reasonably low and the increases referred to, and including the 70-cent rate complained of, were fixed by the U. S. Railroad Administration and the Interstate Commerce Commission and not voluntarily by the defendants. These increases were somewhat out of proportion to the increases accorded many other commodities, giving due consideration to its low grade and the excessive increases were placed upon this traffic to discourage the movement during the war period and to secure an ample supply of coal-carrying equipment and for reasons which are obvious.

Immediately following the conclusion of the war, resumption of construction and road building on a large scale directed the attention of traffic officials and others interested in transportation of this commodity to the excessive rates and particularly to the chaotic condition of the rate structure. Conferences between shippers and carriers with representation by members of the Commission's staff resulted in substantial reductions effective during the month of November, 1921.

Numerous conferences and formal proceedings before the Commission and jointly with the Interstate Commerce Commission have resulted in a general readjustment of the rates on sand, gravel, crushed stone, and agricultural limestone in the territory, and including some increases.

The rate under attack is that fixed by the U. S. Railroad Ad-

ministration and as changed by the Interstate Commerce Commission in a general proceeding, and the rate now in effect reflects the changed transportation conditions following the close of the war and the general readjustment of rates on this commodity in central territory. It is slightly below the minimum rate provided in the Indiana scale recently promulgated by the Commission.

The rate voluntarily established by defendant is not under attack. There is no showing that the rate is unreasonable in and of itself. There is no evidence of discrimination. . Complainant does not ask for rates for the future and the issues are clearly defined as a matter of reparation. The Commission has held that reparation does not necessarily follow where rates are reduced as the result of a state wide readjustment. We find that the rates charged were not unreasonable or unlawful and that reparation should be denied.

Ellis, Harmon, McCardle, concur.

FLORIDA SUPREME COURT.

STATE EX REL. A. S. WELLS et al.
v.
WESTERN UNION TELEGRAPH COMPANY.

(— Fla. —, 118 So. 478.)

Commissions — Jurisdiction over telegraph company.

1. Sections 4393 to 4420, inclusive, of the Revised General Statutes of Florida, clothe the Railroad Commissioners with power to regulate telegraph companies, provided always that such regulation be fair, just, reasonable, and sufficient, and reasonably necessary for the public convenience, and not unjustly burdensome to the company, p. 254.

Appeal and review — Jurisdiction of appellate court — Service questions — Telegraph company.

2. Whether or not the regulation or the service required is fair, just, reasonable, and sufficient, and reasonably necessary for the public convenience, and not unjustly burdensome to the company, must be determined by the facts in the particular case, and is subject to review by the courts, p 254.

P.U.R.1929A.

Constitutional law — Police powers — Regulation of public service corporation.

3. Corporations performing a public or quasi public service may, under the police power of the state, be regulated in the interest of public convenience and necessity. Such regulation must, however, bear reference to the comfort, safety, and welfare of society; it must not conflict with the provisions of the corporate charter, or under the guise of regulation take from the corporation any of the essential rights and privileges which its charter confers, p. 255.

Telegraphs — Nature of service — Regulation.

4. By the very nature of the subject-matter of regulation, telegraph companies cannot be regulated by the same rule, mode, or prescription that railroads and other common carriers are regulated, p. 255.

Commissions — Statutory powers — Jurisdiction — Telegraph company.

5. The powers of the Railroad Commissioners are restricted to those conferred by the express terms of the statute, or those which may be reasonably implied from such express terms, p. 255.

Commissions — Jurisdiction — Statutory powers — Telegraph company.

6. In construing statutes defining the powers and duties of administrative boards or Commissions, the power sought to be exercised must be made to affirmatively appear, before it can be legally exercised, p. 255.

Service — Powers of — Commissions — Authority over telegraph station — Statutes.

7. In the matter of installing telegraph stations, the statute (§ 4406, Revised General Statutes of Florida) in effect provides that the Railroad Commissioners shall have power to require their installation and maintenance, where reasonably necessary for public convenience, if not justly burdensome to the company. There is nothing in the statute which authorizes the Commission to point out the exact location or point in the community where the telegraph station shall be located, or to require the removal of such station from one location in the community to another, p. 255.

[August 1, 1928.]

Headnotes by the COURT.

En banc. MANDAMUS proceedings by the state on relation of the Railroad Commissioners of Florida against the Western Union Telegraph Company; motion to quash alternative writ granted.

Appearances: Theodore T. Turnbull, of Monticello, for relators; John E. & Julian Hartridge, of Jacksonville, Loftin, Stokes & Calkins, of Miami, Francis R. Stark and R. H. Overbaugh, both of New York city, for respondent.

Terrell, J.: This is a proceeding by mandamus on the part of the Railroad Commissioners of Florida to require the Western Union Telegraph Company, a corporation, to install and operate a telegraph station in the town of Apopka for the receipt and dispatch of commercial telegraph messages. The material part or command of the alternative writ is as follows:

"To install and put into practical operation at Apopka, in the state of Florida, in or near the business center of such city, a conveniently located telegraph office for the receipt and dispatch of commercial telegraph messages to and from said city and maintain the same in operation during reasonable hours, and until further order of the Railroad Commission."

There was a motion to quash the alternative writ, predicated on the following grounds:

(1) There is no valid statute giving the Railroad Commission power to require the installation of a telegraphic station.

(2) Even if the statute gives the Railroad Commissioners power to compel the installation of a station in a given locality, it does not give them the power to designate the location in such locality, as they attempt to do in the case at bar, by requiring the respondent to install a station in or near the business center of Apopka, Fla.

(3) That the Railroad Commission under no circumstances has the power to require the removal of a telegraphic station from one location to another location in the same town.

[**1, 2**] Relators are proceeding under the provisions of Chap. 6525, Acts of 1913 (§§ 4393 to 4420, inclusive, of the Revised General Statutes of Florida). Inspection of these provisions of the law can leave no doubt that the Railroad Commission is clothed with power to regulate telegraph companies. It is also manifest what such regulation can under no circumstances be merged into control or operation, but by the very terms of the statute must be "fair, just, reasonable, and sufficient," and must be "reasonably necessary for the public convenience and not unjustly burdensome to the company." Sections 4395 and 4406, Revised General Statutes of Florida. Whether or not the regulation or the service required is fair, just, reasonable, and sufficient, and reasonably necessary for the public conven-

ience, and not unjustly burdensome to the company, must be determined by facts in the particular case, and is subject to review by the courts.

[3] It is well-settled that corporations performing a public or quasi public service may, under the police power of the state, be regulated in the interest of public convenience and necessity. Such regulation must, however, bear reference to the comfort, safety, and welfare of society; it must not conflict with the provisions of the corporate charter, or under the guise of regulation take from the corporation any of the essential rights and privileges which its charter confers. They must be police regulations in fact, and not amendments of the charter in curtailment of its corporate franchise. Cooley's Constitutional Limitations (6th Ed.) 810.

[4] By the very nature of the subject-matter of regulation, telegraph companies cannot be regulated by the same rule, mode, or prescription that railroads and other common carriers are regulated. The nature and character of the service performed is different, the manner in which it is performed is different, and the law regulating its performance is different in many respects. In determining whether or not a regulation like that brought in question here is reasonable, and not unjustly burdensome to the telegraph company, all these differences must be considered.

[5, 6] The powers of the Railroad Commissioners are restricted to those conferred by the express terms of the statute, or those which may be reasonably implied from such express terms. State ex rel. Burr v. Jacksonville Terminal Co. 90 Fla. 721, P.U.R.1926C, 115, 106 So. 576. So far as we have been able to find, the decided tendency of modern decisions, in construing statutes defining the powers and duties of administrative boards or Commissions, is to hold that the power sought to be exercised must be made to affirmatively appear before it can be legally exercised. Railroad Comrs. of Oregon v. Oregon R. & Nav. Co. 17 Or. 65, 19 Pac. 702, 2 L.R.A. 195; 25 R. C. L. 791.

[7] In the matter of installing telegraph stations, the statute (§ 4406, Revised General Statutes of Florida) in effect provides that the Railroad Commissioners shall have power to re-

quire their installation and maintenance, where reasonably necessary for public convenience, if not unjustly burdensome to the company. There is nothing in the statute which authorizes the Commission to point out the exact location or point in the community where the telegraph station shall be located, or to require the removal of such station from one location in the community to another.

In the instant case the alternative writ shows that respondent has an arrangement with the Seaboard Air Line Railway Company, whereby all commercial telegraph messages received or dispatched at Apopka are handled through the office of said railway company, by the agent of said railway company, during such time as the station of said railway company is kept open. It is not alleged that the service so rendered is not ample, and all that is reasonably necessary for the public convenience of the community served. So far as we are advised, this is the method usually adopted in the ordinary community of the size of Apopka for handling telegraphic messages. If this was not the rule, it would be "unjustly burdensome to the company" to provide telegraphic service to a large majority of such communities. It is pointed out in brief of counsel, but this court takes judicial knowledge of the fact, that the last census gave Apopka a population of slightly more than 1,000 people. It is not alleged or attempted to be shown that any peculiar or unusual conditions exist at Apopka that would, in the interest of public convenience, demand additional or different telegraph service from that already provided.

For the reasons announced in this opinion, the motion to quash the alternative writ should be and is hereby granted.

Ellis, Ch. J., and Whitfield, Strum, Brown, and Buford, JJ., concur.